REVISED CODES OF MONTANA

1947

REPLACEMENT

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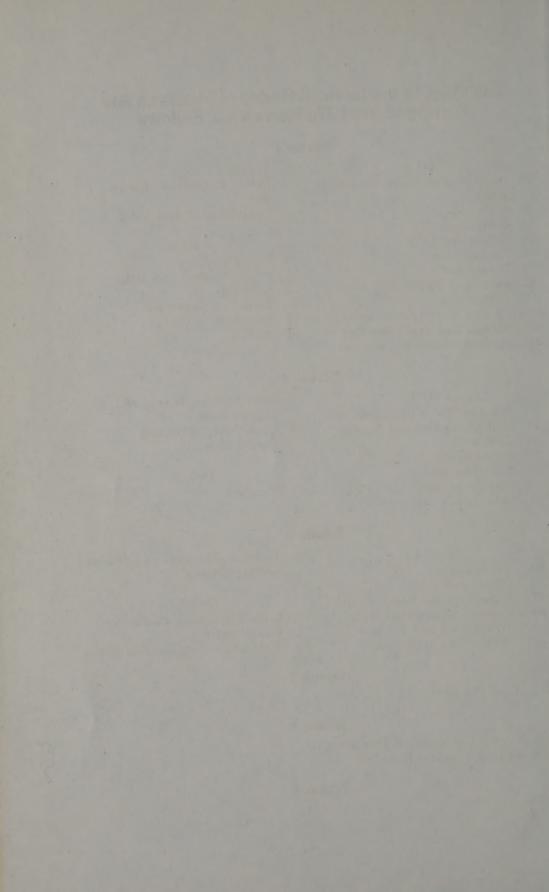
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REVISED CODES OF MONTANA

1947

ANNOTATED

NINE VOLUMES

Compiled, Revised and Annotated Under Chapter 184, Laws of 1945 and Chapter 266, Laws of 1947 And Published Under Chapter 43, Laws of 1947

> I. W. Choate Wesley W. Wertz

CODE COMMISSIONERS OF THE 1947 CODES

OCT 1 5 2008

REPLACEMENT VOLUME 8

OF MONTANA

Crimes and Criminal Procedure
Code of Criminal Procedure

Containing the Permanent Laws of the State in Force at the Close of the Extraordinary Session of the Forty-First Legislative Assembly of 1969

Publishers
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PREFACE

to

Replacement Volume Eight

The 1967 Session of the Legislative Assembly of Montana enacted a new Code of Criminal Procedure codified as Title 95 of the Revised Codes of Montana, 1947. At the same time the Legislature repealed procedural provisions constituting a large portion of Title 94. The new Code of Criminal Procedure was prepared by the Montana Criminal Law Commission under the leadership of Justice Wesley Castles of the Montana Supreme Court.

Enactment of the new Code made necessary replacement of Volume Eight of the Montana Codes. Acting pursuant to Section 12-332.1 of the Revised Codes and in line with the replacement program previously approved by the Montana Bar Association, the Montana Supreme Court authorized this replacement and specified its content.

Replacement Volume Eight contains all existing laws and amendments in Titles 94 and 95 of the Revised Codes, through the regular session and the 1969 extraordinary session of the Forty-First Legislative Assembly, and including also the amendments to Title 95 provisions adopted by Supreme Court Order 1145-2-3-4. Also included are the revised Comments of the Criminal Law Commission and source material prepared by Professor Larry M. Elison, School of Law, University of Montana, vice-chairman of the Commission. The publishers' editorial staff has brought to date the previous notes and annotations, and has added other explanatory notes, history notes, cross-references, and case annotations. Obsolete laws, local and special laws, appropriation acts, resolutions, and enacting and repealing clauses are excluded.

The arrangement and numbering system of the original volume have been retained; hence the General Index and its supplement may be used as before in locating particular laws. Legislative history references have been brought to date and no changes have been made in the general style used heretofore.

The annotations to decisions of the Supreme Court of Montana and to the Supreme Court of the United States and other Federal Courts have been checked and added through Volume 151 Montana Reports, 453 Pacific 2d, Volume 392 United States Reports, Volume 20 Lawyers' Edition 2d, Volume 88 Supreme Court Reporter, Volume 409 Federal Reporter 2d, Volume 297 Federal Supplement, and 27 American Law Reports 3d.

This volume may be cited as Repl. Vol. 8, Revised Codes of Montana, 1947. For citing sections, we recommend "Sec. —, Repl. Vol. 8, Revised Codes of Montana."

To Wesley W. Wertz, Code Commissioner of the 1947 Codes, we extend our thanks for his able assistance and wise counsel in the preparation of this Replacement.

The Publishers

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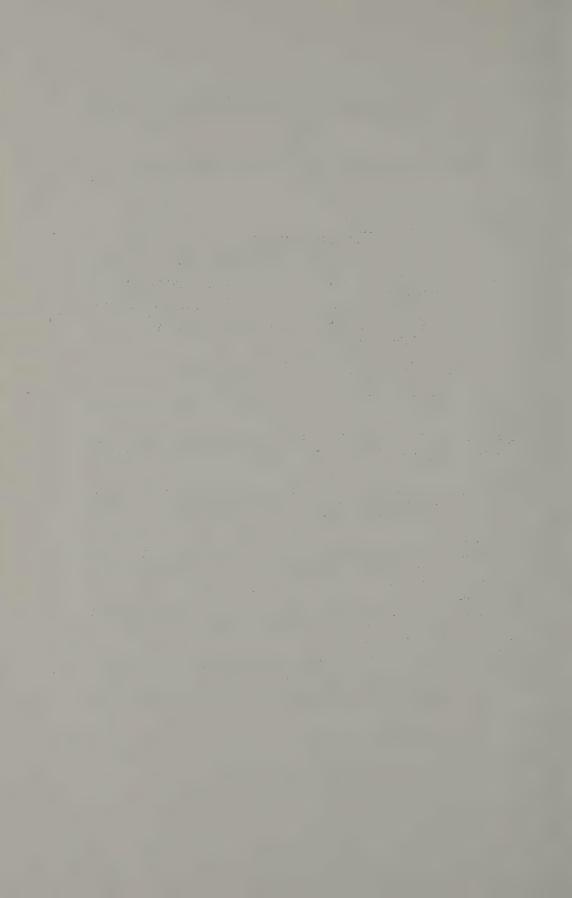


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 Judgment—suspension of sentence and probation, Repealed—Section 4,

 Chapter 194, Laws of 1955; Section 2, Chapter 196, Laws of 1967. 78.
- Uniform act for out-of-state parolee supervision, 94-7901, 94-7902. The execution, Repealed—Section 2, Chapter 196, Laws of 1967. 79.

80.

- Appeals to supreme court—when allowed—how taken—effect thereof, Re-81. pealed—Section 2, Chapter 196, Laws of 1967.
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- 82. appeal, Repealed-Section 2, Chapter 196, Laws of 1967.
- In what cases defendant may be admitted to bail, Repealed-Section 2, 83. Chapter 196, Laws of 1967.
- Bail on being held to answer before information, Repealed—Section 2, Chapter 196, Laws of 1967. 84.
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- Bail on appeal-deposit in lieu of bail, Repealed-Section 2, Chapter 196, Laws of 1967.
- 87. Surrender of defendant-forfeiture of bail-recommitment of defendant, Repealed-Section 2, Chapter 196, Laws of 1967.

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- 94. Compromising offenses by leave of court, Repealed-Section 2, Chapter 196, Laws of 1967.
- Dismissal of actions for want of prosecution or other reasons, Repealed—Section 2, Chapter 196, Laws of 1967. 95.
- Proceedings against corporations, Repealed-Section 2, Chapter 196, Laws 96.
- Disposal of property stolen or embezzled, Repealed-Section 2, Chapter 97. 196, Laws of 1967.
- 99.
- Probation, parole and clemency, 94-9821 to 94-9851.

 Bastardy proceedings, 94-9901 to 94-9908.

 Justices' and police court proceedings—appeals, Repealed—Section 2, Chapter 196, Laws of 1967. 100.
- The writ of habeas corpus, Repealed-Section 2, Chapter 196, Laws of 1967. 101.
- 301.
- Coroner's inquests, Repealed—Section 2, Chapter 196, Laws of 1967.

 Search warrants, Repealed—Section 2, Chapter 196, Laws of 1967.

 Reward for apprehension of fugitives from justice and persons committing 401.
- robbery on certain conveyances, 94-401-1 to 94-401-3. Uniform criminal extradition act, 94-501-1 to 94-501-32. 501.
- Miscellaneous provisions respecting special proceedings of a criminal nature, Repealed—Section 2, Chapter 196, Laws of 1967. 601.
- Prisoner's attendance at court—how obtained, 94-701-1. Fines and forfeitures—disposal of, 94-801-1, 94-801-2.
- Reciprocal enforcement of support, Repealed—Section 3, Chapter 208, Laws of 1961. 901.
- Criminal law study commission, 94-1001-1 to 94-1001-11. 1001.
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CHAPTER 1

DEFINITIONS AND PRELIMINARY PROVISIONS

- Section 94-101. Construction of penal statutes.
 - 94-102. Provisions similar to existing laws, how construed.
 - 94-103. Effect of code upon past offenses.
 - 94-104. Repealed.
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 - Intent, how manifested, and who considered of sound mind. 94-118.
 - 94-119. Drunkenness no excuse for crime—when it may be considered—how insanity must be proven.
- (10710) Construction of penal statutes. The rule of the com-94-101. mon law, that penal statutes are to be strictly construed, has no application

to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

History: En. Sec. 4, Pen. C. 1895; re-en. Sec. 8096, Rev. C. 1907; re-en. Sec. 10710, R. C. M. 1921. Cal. Pen. C. Sec. 4.

Construing Penal Statutes

Contention that sections 59-518 to 59-520, defining "nepotism" and prohibiting public officers, boards or commissions from appointing relatives to a position of trust or emolument, and providing punishment by fine and imprisonment in the county jail, should be strictly construed as penal statutes rejected. State ex rel. Kurth v. Grinde, 96 M 608, 614, 32 P 2d 15.

Statutes in Derogation of Common Law Liberally Construed

Under section 12-202 and this section,

the rule that statutes in derogation of common law must be strictly construed does not apply to code provisions (including penal), liberal construction being the rule as to all; hence, prior decisions to repealed section, relating to the liability of directors of corporations for the corporations' debts for failure to file an annual report, being penal in character and unknown to the common law, must be strictly construed, are overruled. Continental Supply Co. v. Abell, 95 M 148, 163, 24 P 2d 133.

Collateral References

Statutes \$\infty 241 (1).
82 C.J.S. Statutes § 311 et seq.
50 Am. Jur. 2d 432-438, Statutes, §§ 408-0.

94-102. (10711) Provisions similar to existing laws, how construed. The provisions of this code, so far as they are the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

History: En. Sec. 5, Pen. C. 1895; re-en. Sec. 8097, Rev. C. 1907; re-en. Sec. 10711, R. C. M. 1921. Cal. Pen. C. Sec. 5.

Amendment Increasing Punishment

Where effect of amendment of statute is only to increase prescribed punishment, the unchanged portion of statute remains in effect. State v. Cline, 135 M 372, 339 P 2d 657.

Collateral References

Statutes \$225%. 82 C.J.S. Statutes \$370. 50 Am. Jur. 2d 462, Statutes, \$443.

94-103. (10712) Effect of code upon past offenses. No act or omission, commenced after twelve o'clock, noon, of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted under any such statutes, and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed.

History: En. Sec. 6, Pen. C. 1895; re-en. Sec. 8098, Rev. C. 1907; re-en. Sec. 10712, R. C. M. 1921. Cal. Pen. C. Sec. 6.

Collateral References

Criminal Law 53. 22 C.J.S. Criminal Law §§ 1, 24.

94-104. (10713) Repealed—Chapter 25, Laws of 1947.

94-105. (10714) What intent to defraud is sufficient. Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

History: En. Sec. 8, Pen. C. 1895; re-en Sec. 8100, Rev. C. 1907; re-en. Sec. 10714, R. C. M. 1921, Cal. Pen. C. Sec. 8.

General Intent

Effect of this section is to make any required "intent to defraud" a general,

rather than a specific, intent. State v. Cooper, 146 M 336, 406 P 2d 691.

Collateral References

False Pretenses 5; Fraud 68. 2 C.J.S. Agency § 10; 35 C.J.S. False Pretenses § 4, 5; 37 C.J.S. Fraud § 154.

94-106. (10715) Civil remedies preserved. The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

History: En. Sec. 9, Pen. C. 1895; re-en. Sec. 8101, Rev. C. 1907; re-en. Sec. 10715, R. C. M. 1921, Cal. Pen. C. Sec. 9.

Collateral References

1 C.J.S. Actions § 11; 29A C.J.S. Embracery § 10.

(10716) Proceedings to impeach or remove officers and others The omission to specify or affirm in this code any ground of preserved. forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

History: En. Sec. 10, Pen. C. 1895; re-en. Sec. 8102, Rev. C. 1907; re-en. Sec. 10716, R. C. M. 1921. Cal. Pen. C. Sec. 10.

Collateral References

Officers 7: States 52.

67 C.J.S. Officers § 68; 81 C.J.S. States § 78 et seq. 43 Am. Jur. 27 et seq., Public Officers,

§ 175 et seq.

94-108. (10717) Authority of court-martial preserved—courts of justice to punish for contempt. This code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

History: En. Sec. 11, Pen. C. 1895; re-en. Sec. 8103, Rev. C. 1907; re-en. Sec. 10717, R. C. M. 1921. Cal. Pen. C. Sec. 11.

Collateral References

Services \$\infty 42 et seq.; Contempt 30.

6 C.J.S. Army and Navy § 51 et seq.; 17 C.J.S. Contempt § 43.

36 Am. Jur. 244 et seq., Military, § 87 et seq.; 17 Am. Jur. 2d 63, Contempt, § 63.

94-109. (10718) Sections declaring crimes punishable—duty of court. The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed, except in cases where a jury is authorized to determine and impose the same.

History: En. Sec. 12, Pen. C. 1895; reen. Sec. 8104, Rev. C. 1907; reen. Sec. 10718, R. C. M. 1921. Cal. Pen. C. Sec. 12.

Collateral References

Criminal Law 977 (1). 24 C.J.S. Criminal Law §§ 1558, 1611, 1622.

21 Am. Jur. 2d 542, Criminal Law, § 577.

(10719) Punishments, how determined. Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court or by the jury authorized to pass sentence, within such limits as may be prescribed by this code.

History: En. Sec. 13, Pen. C. 1895; reen. Sec. 8105, Rev. C. 1907; reen. Sec. 10719, R. C. M. 1921. Cal. Pen. C. Sec. 13.

Collateral References

Criminal Law 1208 (3). 24B C.J.S. Criminal Law 1982. 21 Am. Jur. 2d 515 et seq., Criminal Law, 533 et seq.

94-111. (10720) Witness' testimony may be read, against him on prosecution for perjury. The various sections of this code, which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

History: En. Sec. 14, Pen. C. 1895; re-en. Sec. 8106, Rev. C. 1907; re-en. Sec. 10720, R. C. M. 1921. Cal. Pen. C. Sec. 14.

Collateral References

Perjury \$32 (7).
70 C.J.S. Perjury \$29.
41 Am. Jur. 29, Perjury, \$52.

94-112. (10721) Crime and public offense defined. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

- 1. Death:
- 2. Imprisonment;
- 3. Fine:
- 4. Removal from office; or,
- 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state.

History: En. Sec. 15, Pen. C. 1895; re-en. Sec. 8107, Rev. C. 1907; re-en. Sec. 10721, R. C. M. 1921. Cal. Pen. C. Sec. 15.

A "Law"

A valid city ordinance, passed by the municipality with the design of the legislature is a "law" as that term is used in this section, defining a public offense as an act committed or omitted in violation of a law, and such ordinance has, within the territorial jurisdiction of the municipality, the same force and is to be treated as a legislative act. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

Contempt a Public Offense

A contempt of court, punishable by fine or imprisonment, or both, is a public offense under this section. State ex rel. Flynn v. District Court, 24 M 33, 35, 60 P 493.

Ordinance Violation Case Criminal in Nature

An action by a city instituted in its police court by the filing of a complaint charging a physician with practicing his profession within the city without first procuring a license permitting him to do so, in violation of one of its ordinances, and seeking the imposition of a fine, was criminal in its nature, and therefore the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest (City of Bozeman v. Nelson, 73 M 147, 237 P 528, intimating that such an action is a civil one, modified to conform to the views expressed above.) State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

Removal from Office

A proceeding for the summary removal of a county attorney, for misconduct, even though instituted by a private person, is a public proceeding, and, though it is summary in its nature, is to be classed as a prosecution for crime. State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

An officer (county clerk), charged with willful neglect of duty is not entitled to jury trial in proceeding for his removal from office. State ex rel. Bullock v. District Court, 62 M 600, 602, 205 P. 955.

Threatened Violation of Ordinance Not Public Offense

The threatened violation of a town ordinance is not a "public offense" within the meaning of this section. State ex rel. Streit v. Justice Court, 45 M 375, 380, 123 P 405.

Collateral References

Criminal Law S\$ 2, 3. 22 C.J.S. Criminal Law S\$ 2, 3. 21 Am. Jur. 2d 84, Criminal Law § 1.

94-113. (10722) Crimes, how divided. Crimes are divided into:

- 1. Felonies; and,
- 2. Misdemeanors.

History: En. Sec. 3, p. 189, Cod. Stat. 1871; re-en. Sec. 3, 3d Div. Rev. Stat. 1879; re-en. Sec. 3, 3d Div. Comp. Stat. 1887; re-en. Sec. 16, Pen. C. 1895; re-en. Sec. 8108, Rev. C. 1907; re-en. Sec. 10722, R. C. M. 1921. Cal. Pen. C. Sec. 16.

Collateral References

Criminal Law \$27. 22 C.J.S. Criminal Law §§ 6, 7. 21 Am. Jur. 2d 101, Criminal Law, § 19.

94-114. (10723) Felony and misdemeanor defined. A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison.

History: En. Sec. 4, p. 190, Cod. Stat. 1871; re-en. Sec. 4, 3d Div. Rev. Stat. 1879; re-en. Sec. 4, 3d Div. Comp. Stat. 1887; amd. Sec. 17, Pen. C. 1895; re-en. Sec. 8109, Rev. C. 1907; re-en. Sec. 10723, R. C. M. 1921. Cal. Pen. C. Sec. 17.

Concurrent Sentences

Where defendant was convicted of felony under first portion of consolidated information and of misdemeanor under second portion and the trial court adjudged that the sentences be served concurrently, the felony sentence was to be served in state prison with credit for misdemeanor fine to be given at the same time, and any remaining time under the misdemeanor at end of the state prison term was to be served in county jail. State v. Bogue, 142 M 459, 384 P. 2d 749.

Offense Punishable as Felony or Misdemeanor

Where an offense which is not divisible into degrees and does not include a lesser offense, is punishable either as a misdemeanor or as a felony in the discretion

of the court or jury, it is the possible sentence which determines the grade of the crime; hence it is to be deemed a felony up to the time of judgment, whereupon, if the punishment inflicted be other than imprisonment in the state prison, it is to be considered a misdemeanor for all purposes, under this section. State v. Atlas, 75 M 547, 551, 244 P 477.

Rule To Determine under Federal Law

As contradistinguished from the rule prevailing in Montana which classifies crimes after judgment as felonies or misdemeanors by the punishment actually imposed, the test to be applied in determining whether a crime is a felony under the federal law is the punishment which may be inflicted, and not what was actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 454, 8 P 2d 791.

Collateral References

Criminal Law 527. 22 C.J.S. Criminal Law §§ 6, 7. 21 Am. Jur. 2d 101, Criminal Law, § 19.

94-115. (10724) Punishment of felony, when not otherwise prescribed. Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 18, Pen. C. 1895; re-en. Sec. 8110, Rev. C. 1907; re-en. Sec. 10724, R. C. M. 1921. Cal. Pen. C. Sec. 18.

Operation and Effect

Generally, every felony is punishable either by death or imprisonment in the

state prison, and every misdemeanor by fine or imprisonment in the county jail. State ex rel. City of Butte v. District Court, 37 M 202, 206, 95 P 841.

Collateral References

Criminal Law 1208 (6). 24B C.J.S. Criminal Law 1985. 21 Am. Jur. 2d 547 et seq., Criminal Law, 583 et seq.

94-116. (10725) Punishment of misdemeanor, when not otherwise prescribed. Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both.

History: En. Sec. 19, Pen. C. 1895; re-en. Sec. 8111, Rev. C. 1907; re-en. Sec. 10725, R. C. M. 1921. Cal. Pen. C. Sec. 19.

Applicable to Acts Made Misdemeanors after Passage

This section is applicable to acts made misdemeanors after its passage. State v. Williams, 106 M 516, 522, 79 P 2d 314.

Collateral References

Criminal Law = 1208 (1). 24B C.J.S. Criminal Law §§ 1986. 21 Am. Jur. 2d 547 et seq., Criminal Law, § 583 et seq.

94-117. (10726) To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.

History: En. Sec. 1, p. 176, Bannack Stat.; amd. Sec. 1, p. 269, Cod. Stat. 1871; re-en. Sec. 1, 4th Div. Rev. Stat. 1879; re-en. Sec. 1, 4th Div. Comp. Stat. 1887; amd. Sec. 20, Pen. C. 1895; re-en. Sec. 8112, Rev. C. 1907; re-en. Sec. 10726, R. C. M. 1921. Cal. Pen. C. Sec. 20.

Conclusive Presumption of Intent

In a statutory offense, as for collecting illegal fees, the intent is conclusively presumed. State ex rel. Rowe v. District Court, 44 M 318, 326, 119 P 1103.

Criminal Negligence

In so far as offense of involuntary manslaughter is concerned under section 94-2507, proof of culpability is supplied by evidence of criminal negligence. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

It is wholly unnecessary in involuntary manslaughter cases to superimpose upon requirement of criminal negligence the further requirement that a determination must be made as to whether the act resulting in death might ordinarily be classified as malum in se or merely malum prohibitum, for, if that act is done in a manner which is criminally negligent, it thereby becomes malum in se and thereby includes the element of mens rea. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

Under prosecution for involuntary manslaughter, irrespective of character of unlawful act, whether malum in se or merely malum prohibitum, criminality of the act resulting in death is established if that act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point, 134 M 519, 525, 333 P 2d 1017, 1021.

Insanity as Affecting Intent

On the question of insanity in homicide, the court should instruct in the language of this and the following section, then define insanity as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent, supplementing the definition by the comment that criminal responsibility is to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime. State v. Keerl, 29 M 508, 521, 75 P 362.

In view of this and the following section an insane person in criminal law is one who is mentally unable to form a criminal intent. State v. Keerl, 29 M 508, 520, 75 P 362.

Instructions

An instruction embodying the provisions of this and the following section, upon the presence of joint operation of act and intent in order to constitute a crime, should be given in every criminal prosecution, especially when requested by defendant. State v. Allen, 34 M 403, 418, 87 P 177.

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault under which general nonstatutory intent to do harm willfully, wrongfully and unlawfully is an element but under which specific statutory intent to do any particular kind or degree of injury to victim is not an element. State v. Fitzpatrick, 149 M 400, 427 P 2d 300.

Since specific intent was not necessary element of second degree assault, refusal of instruction thereon was proper even though defendant claimed that high degree of intoxication precluded formation of intent, assault statute not requiring proof of specific intent. State v. Warrick, — M —, 446 P 2d 916.

Involuntary Manslaughter

Willful or evil intent is not an element of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017, 1021.

Presumption as to Intent and Consequences

An instruction charging the jury that, when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first degree, the very gist of which offense is the intent with which it was committed. State v. Schaefer, 35 M 217, 221, 88 P 792.

Collateral References

Criminal Law € 1. 22 C.J.S. Criminal Law § 2, 3. 21 Am. Jur. 2d 162, Criminal Law, § 81.

94-118. (10727) Intent, how manifested, and who considered of sound mind. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

History: En. Secs. 2, 3, p. 176, Bannack Stat.; amd. Secs. 2, 3, p. 269, Cod. Stat. 1871; re-en. Secs. 2, 3, 4th Div. Rev. Stat. 1879; re-en. Secs. 2, 3, 4th Div. Comp. Stat. 1887; amd. Sec. 21, Pen. C. 1895; re-en. Sec. 8113, Rev. C. 1907; re-en. Sec. 10727, R. C. M. 1921. Cal. Pen. C. Sec. 21.

Evidence of Specific Intent

Finding of jury that defendant was able to form specific intent to commit first degree assault as required by statute was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty recounting recent events to police. State v. Lukus, 149 M 45, 423 P 2d 49.

Instruction in Language of Statute

An instruction in the language of this section was not objectionable, the expression "the offense" having reference to the crime charged in the information, and not being subject to the criticism that it assumed that in fact a crime had been committed. State v. Gordon, 35 M 458, 467, 90 P 173.

Intent To Defraud

Proof of intent to defraud may consist

of reasonable inferences drawn from affirmatively established facts, and where defendant was sufficiently conscious at the time to recognize fraudulent nature of check, he was of adequate mental ability to form an intent to defraud by uttering the check knowing of its fraudulent nature. State v. Cooper, 146 M 336, 406 P 2d 691.

Manifestation of Intent

Where the evidence showed that defendant, a total stranger, charged with committing lewd and lascivious acts upon a nine-year-old girl, accosted her on the street and asked her to come to his room and play with him, and on arriving there locked the door and asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, it was sufficient to warrant the jury in believing that he had the intent to arouse his sexual desires in a depraved manner. State v. Kocher, 112 M 511, 515, 119 P 2d 35.

Presumption as to Sound Mind

The presumption that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity, attaches not only in a criminal case in which the defense of insanity is interposed, but generally to human conduct in the relation, of life, and the giving of an

instruction to that effect in a will contest in which the sanity of the testator was called in question was not error. In re Murphy's Estate, 43 M 353, 373, 116 P 1004.

The presumption is that one, who claims to have been injured by transactions had with him at a time when he was not mentally competent, was of sound mind at the time and that he comprehended and knew the nature and consequences of his acts, and the burden of showing incompetency by a preponderance of the evidence was upon him. Sommerville v. Greenhood, 65 M 101, 114, 210 P 1048.

Collateral References

Criminal Law \$20, 46, 22 C.J.S. Criminal Law \$\$29, 55, 21 Am. Jur. 2d, Criminal Law, p. 111 et seq., \$26 et seq.; p. 162 et seq., \$81 et seq.

94-119. (10728) Drunkenness no excuse for crime—when it may be considered—how insanity must be proven. 1. No act committed by a person while in a state of voluntary intoxication is less criminal by his being in said condition. But, whenever the actual existence of any particular purpose, motive, or intent, is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

2. When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven by the defendant by a preponderance of the testimony; provided, however, that said defendant may have his sanity or insanity determined in the manner provided by law, by requesting the district court to determine the same, at any time before the jury is obtained.

History: En. Sec. 22, Pen. C. 1895; re-en. Sec. 8114, Rev. C. 1907; re-en. Sec. 10728, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1925, Cal. Pen. C. Sec. 22.

Cross-Reference

Competency of accused, mental disease or defect excluding responsibility as affirmative defense, sec. 95-503.

Subd. 1

Effect of Intoxication on Confession

Confession of intoxicated defendant was voluntary and admissible in light of evidence that he was able to recite in great detail events occurring prior to and during act charged. State v. Chappel, 149 M 114, 423 P 2d 47.

Instruction in Language of This Section

Where the sole defense of one charged with an attempt to commit rape was intoxication, the trial court held not to have committed error in giving an instruction in the words of subdivision 1 of this section, although, as a general rule, courts do not approve the giving of abstract propositions of law as instructions to juries. State v. Stevens, 104 M 189, 201, 65 P 2d 612, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Intoxication as Defense

Intoxication is no defense to a criminal charge any further than that it may be

shown in mitigation, and that it had reached a stage where the accused was incapable of forming a malicious intent; where defendant on the day previous to the assault told the prosecuting witness that he was going to get a gun and kill him, relative to a matter occurring a year previous, and on the day of the assault, referring to it again, viciously assaulted such witness, thus showing his capacity to harbor malice, his alleged intoxication was no defense. State v. Laughlin, 105 M 490, 494, 73 P 2d 718.

Since specific intent is not element of second degree assault, the court was correct in refusing defendant's offered instruction that jury could take degree of intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent. State v. Warrick, — M —, 446 P 2d 916. While voluntary intoxication is gener-

While voluntary intoxication is generally no defense to a criminal charge, it may be a defense where a specific intent is an essential element of the crime charged. Alden v. State, 234 F Supp 661, 672, affirmed in 345 F 2d 530.

Intoxication As Affecting Degree of Crime

In murder prosecution, jury was properly instructed that if killing was done by defendant with malice aforethought, but defendant was incapable of premeditation and deliberation because of intoxication

then crime was second-degree murder, and that if defendant was so intoxicated at time of killing that he was incapable of harboring malice aforethought, crime was manslaughter. State v. Brooks, 150 M 399, 436 P 2d 91.

Intoxication as Reducing Degree

If a person who is charged with murder in first degree was intoxicated when offense was committed to such an extent as to render him incapable of entertaining the purpose, intent, or malice requisite for first degree murder, the crime is reduced to second degree murder. State v. Palen, 119 M 600, 178 P 2d 862, 866.

Question of Intoxication on Appeal

Where the question whether defendant was so far under the influence of intoxicating liquor that he could not entertain the necessary criminal intent to commit robbery in the perpetration of which he committed homicide was fully and fairly presented, with instructions tendered by defendant himself, and there was ample evidence to justify the conclusion of the jury that he was able to entertain such intent as evidenced by their verdict, the question of intoxication is eliminated from consideration on appeal. State v. Reagin, 64 M 481, 489, 210 P 86.

When Instruction Warranted

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity. State v. Kuum, 55 M 436, 448, 178 P 288.

Subd. 2

Burden of Proof

Defendant charged with homicide has the burden of proving his defense of insanity by a preponderance of the testimony, and an instruction that the state was required to prove beyond a reasonable doubt that he was sane was erroneous. State v. Vettere, 76 M 574, 591, 248 P 179. Since the enactment of this section in

Since the enactment of this section in 1925, the burden of proving insanity, pleaded by a defendant charged with crime, is upon him and not the state; hence an instruction that the state was required to prove beyond a reasonable doubt that defendant was sane at the time of the commission of the offense was error. State v. DeHaan, 88 M 407, 292 P 1109.

Evidence of Insanity

Defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by a preponderance of testimony, as required by statute, in view of evidence that his activities on day of shooting were normal, he was quite calm after shooting occurred and he knew right from wrong at time of shooting, according to psychiatrist. State v. Sanders, 149 M 166, 424 P 2d 127.

Insanity as Defense

Evidence in a prosecution for assault in the second degree, in which the defense was insanity, an expert testifying the defendant was suffering from epilepsy, rendering him incapable of knowing or remembering what he was doing during an attack, held sufficient to support the verdict of guilty, it appearing, among other things, that after striking his victim with a gun he warned her not to say anything about it, concealed himself thereafter, and a month later detailed the entire transaction to the medical expert. State v. DeHaan, 88 M 407, 292 P 1109.

Insanity Defined

Insanity constitutes any defect, weakness or disease of the mind which renders it incapable of entertaining, in the particular instance, the criminal intent which is an ingredient of all crimes. State v. Narich, 92 M 17, 24, 9 P 2d 477.

Instructions on Insanity

In the trial of criminal cases in which the defense of insanity is relied upon, trial courts, in instructing juries on that subject, should make the instructions as plain and simple as possible, incorporate therein the appropriate code sections, supplementing the definition of insanity as indicated in the case of State v. Peel, 23 M 358, 59 P 169, and avoid numerous instructions which may be confusing and serve no useful purpose. State v. Narich, 92 M 17, 24, 9 P 2d 477.

Opinion of Lay Witness on Insanity

Opinion evidence of lay witnesses who were intimately acquainted with defendant charged with homicide prior to the commission of the offense as to his sanity, and who thus had an opportunity to observe his actions theretofore, held admissible on the issue of his then sanity, such evidence in many instances being more helpful in solving the question than opinions of experts based upon hypothetical questions. State v. Simpson, 109 M 198, 209, 95 P 2d 761, overruled on other grounds in State v. Knox, 119 M 449, 453, 175 P 2d 774.

Collateral References

Criminal Law \$53, 355, 570 (2). 22 C.J.S. Criminal Law §§ 66, 621; 23 C.J.S. Criminal Law § 924.

21 Am. Jur. 2d, Criminal Law, p. 116 et seq., § 31 et seq.; p. 185 et seq., § 107

Test of present insanity preventing trial or punishment. 3 ALR 94.

Homicide, drunkenness as affecting existence of elements essential to murder in

second degree. 8 ALR 1052.

Remedy of one convicted while insane.
10 ALR 213 and 121 ALR 267.

Homicide, voluntary intoxication as a defense to. 12 ALR 861 and 79 ALR 897.

Constitutionality of statutes relating to determination of plea of insanity in criminal case. 67 ALR 1451.

Constitutionality of statute which provides for commitment of accused acquitted on ground of insanity to hospital for insane without examination of present mental condition. 145 ALR 892.

Test or criterion of mental condition within contemplation of statute providing for commitment of persons because of mental condition. 158 ALR 1220.

Voluntary intoxication as defense to criminal charge, modern status of the rules as to. 8 ALR 3d 1236.

CHAPTER 2

PERSONS LIABLE TO PUNISHMENTS—PARTIES TO CRIME

Who are capable of committing crimes. Section 94-201.

94-202. Who are liable to punishment. 94-203. Classification of parties to crime.

Who are principals. Who are accessories. 94-204. 94-205.

94-206. Punishment of accessories.

- 94-201. (10729) Who are capable of committing crimes. All persons are capable of committing crimes except those belonging to the following classes:
- 1. Children under the age of fourteen, and over the age of seven, in the absence of clear proof that, at the time of committing the act charged against them, they knew its wrongfulness. Children under the age of seven are not capable of committing crime.
 - 2. Idiots.
 - 3. Lunatics and insane persons.
- 4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent.
- 5. Persons who committed the act charged without being conscious thereof.
- Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.
- 7. Married women (except for felonies) acting under threats, command, or coercion of their husbands.
- 8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to, and did, believe their lives would be endangered if they refused.

History: For earlier acts see Secs. 4-9. pp. 176, 177, Bannack Stat.; Secs. 4-11, p. 270, Cod. Stat. 1871; Secs. 4-11, 4th Div. Rev. Stat. 1879; Secs. 4-11, 4th Div. Comp.

This section en. Sec. 30, Pen. C. 1895; re-en. Sec. 8116, Rev. C. 1907; re-en. Sec. 10729, R. C. M. 1921. Cal. Pen. C. Sec. 26.

Cross-Reference

Competency of accused, mental disease or defect excluding responsibility, sec.

Evidence of Insanity

Defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by preponderance of evidence, as required by statute, in view of evidence that his activities on day of shooting were normal, he was quite calm after shooting occurred and he knew right from wrong at the time of the shooting, according to psychiatrist. State v. Sanders, 149 M 166, 424 P 2d 127.

Instructions

Refusal to give instruction under subd. 6 of this section was not reversible error in view of other instructions given. State v. Allison, 122 M 120, 199 P 2d 279, 289.

Tribal Indian

Indians, though belonging to a tribe which maintains a tribal organization, occupying a reservation within a state, are amenable to state laws as to criminal offenses against such laws committed by them off the reservation and within the state, even though crime is against an Indian of the same tribe. State v. Youpee, 103 M 86, 93, 61 P 2d 832.

Collateral References

Criminal Law 20, 31, 33, 38, 48; Hus-

band and Wife ≥ 108; Infants ≥ 66.

22 C.J.S. Criminal Law § 29, 38, 40, 42, 44, 47, 49, 51, 53, 57-59; 41 C.J.S. Husband and Wife § 222; 43 C.J.S. Infants § 95.

21 Am. Jur. 2d 111, Criminal Law, § 26

Homicide, drunkenness as affecting existence of elements essential to murder in second degree. 8 ALR 1052.

Remedy of one convicted of crime while insane. 10 ALR 213 and 121 ALR 267.

Homicide, voluntary intoxication as a defense to, 12 ALR 861 and 79 ALR 897. Duress, criminal responsibility of child

where act done under fear of, or compulsion by, parent. 16 ALR 1470.

Rape or assault with intent to commit rape, incapacity of infant charged with, as defense. 26 ALR 772.

Subnormal mentality as defense to crime. 44 ALR 584.

Irresistible impulse as an excuse for crime. 70 ALR 659 and 173 ALR 391.

Instruction applying rule of reasonable doubt with respect to insanity as carrying instruction placing burden of proof upon defendant in that regard. 120 ALR 608.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 166 ALR 1194.

Modern test of criminal responsibility. 45 ALR 2d 1447.

Voluntary intoxication as defense to criminal charge, modern status of the rules as to. 8 ALR 3d 1236.

94-202. (10730) Who are liable to punishment. The following persons are liable to punishment under the laws of this state:

- All persons who commit, in whole or in part, any crime within this state.
- All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen in, this state.
- 3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

History: En. Sec. 31, Pen. C. 1895; re-en. Sec. 8117, Rev. C. 1907; re-en. Sec. 10730, R. C. M. 1921. Cal. Pen. C. Sec. 27.

Collateral References

Criminal Law 97 (1), 98. 22 C.J.S. Criminal Law §§ 134, 143, 145, 146, 148.

21 Am. Jur. 2d 143 et seq., Criminal Law, § 62 et seq.

94-203. (10731) Classification of parties to crime. The parties to crimes are classified as:

- 1. Principals; and,
- Accessories.

History: En. Sec. 40, Pen. C. 1895; re-en. Sec. 8118, Rev. C. 1907; re-en. Sec. 10731, R. C. M. 1921. Cal. Pen. C. Sec. 30.

Collateral References

Criminal Law 59 (1), 69, 75. 22 C.J.S. Criminal Law § 79 et seq. 21 Am. Jur. 2d 197, Criminal Law, § 120 et seq.

Incapacity personally to commit the offense as affecting criminal responsibility of one co-operating in offense. 5 ALR 782; 74 ALR 1110 and 131 ALR 1322.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy. 12 ALR 275.

Guilt of one aiding or abetting suicide.

13 ALR 1259.

Acquittal of principal or conviction of lower degree of offense as affecting prosecution of aider or abettor. 24 ALR 603.

Accessory before fact in manslaughter. 44 ALR 576.

Criminal responsibility of one who acts as sentinel during violation of intoxicating liquor law. 64 ALR 427.

Incapacity personally to commit the offense as affecting criminal responsibility of one co-operating in offense. 74 ALR 1110 and 131 ALR 1322.

May accessory to larceny or theft be convicted of offenses of receiving or concealing the stolen property. 136 ALR 1087.

94-204. (10732) Who are principals. All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

History: Earlier acts were Sec. 10, p. 177, Bannack Stat.; Sec. 12, p. 271, Cod. Stat. 1871; Sec. 12, 4th Div. Rev. Stat. 1879; Sec. 12, 4th Div. Comp. Stat. 1887.

This section en. Sec. 41, Pen. C. 1895; re-en. Sec. 8119, Rev. C. 1907; re-en. Sec. 10732, R. C. M. 1921, Cal. Pen. C. Sec. 31.

"Accomplice" Defined

An accomplice is one who is guilty of complicity in the crime charged, either by being present and aiding or abetting in it, or by having advised and encouraged it, though absent from the place at which it is committed. State v. Spotted Hawk, 22 M 33, 65, 55 P 1026.

If a witness for the state whose testi-

If a witness for the state whose testimony is relied upon by it to convict the defendant on trial for crime could himself have been informed against for the offense, either as principal, strictly speaking, or as accessory before the fact, and as such made a principal by this section, he is an accomplice whose uncorroborated testimony is insufficient to sustain conviction. State v. Keithley, 83 M 177, 181, 271 P 449.

To constitute a witness an accomplice he must have been guilty of complicity in the crime charged, either by being present and aiding in and abetting it, or by having advised and encouraged its commission, though absent at the time; he must have knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime; the test is: Would the facts justify his prosecution with the defendant on trial?

State v. McComas, 85 M 428, 433, 278 P 993.

An accomplice is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime. State v. Harmon, 135 M 227, 340 P 2d 128.

"Advised" and "Encouraged"

An instruction in a prosecution for grand larceny, that a person who "advised or encouraged" another in the commission of a crime is to be considered a principal, instead of "advised and encouraged," was not prejudicially erroneous, the words "advised" and "encouraged" being synonymous in popular meaning. State v. Allen, 34 M 403, 416, 87 P 177.

"Aid and Abet" Not "Aid or Abet"

An instruction defining "principals" as all persons who "aid or abet" in the commission of an offense, instead of "aid and abet" as used in this section, is incorrect. State v. McClain, 76 M 351, 246 P 956.

The use of the disjunctive "or" in an instruction in a criminal case defining who are principals, saying that one who aids "or" abets another in the commission of an offense is a principal, instead of aids "and" abets, the conjunctive, is error. State v. Ludwick, 90 M 41, 300 P 558.

Aiding and Abetting

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show the defendant's guilt that he aided or abetted

in the commission of the crime. State v. Maciel, 130 M 569, 305 P 2d 335, 336.

Common-Law Distinction between Principal and Accessory Abolished

The distinction recognized by the common law between principals and accesssories before the fact is abolished in this state. State v. Dotson, 26 M 305, 308, 67 P 938.

Conspiracy

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. State v. Alton, 139 M 479, 365 P 2d 527, 535.

All participants in a conspiracy may be found guilty of any of the degrees of

murder or one or more may be found guilty of each degree. State v. Alton, 139

M 479, 365 P 2d 527, 538.

All parties to a conspiracy are guilty whether their part in the conspiracy is large or small, and whether or not that part is to be carried out at a distance from the other conspirators. State v. Alton, 139 M 479, 365 P 2d 527, 538.

Criminal Intent in One Aiding and Abetting

Whether one charged as a principal in receiving stolen property, though he only aided and abetted another in actually receiving it, knew that it was stolen and entertained the criminal intent required by this section, may be established by circumstantial evidence. State v. Huffman, 89 M 194, 200, 296 P 789.

Evidence Insufficient To Hold as Principal

In a prosecution against husband and wife for the unlawful sale of intoxicating liquor, evidence showing that while the wife was present at their home where the sale was made by the husband, all she did was to refer the buyer to him upon request for the liquor, remaining otherwise passive, held insufficient to justify her conviction on the theory that by her presence and acquiescence in what was done by the husband she was guilty as a principal under this section. State v. Cornish, 73 M 205, 209, 235 P 702.

Felony Murder Rule

Where defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first de-

gree murder. State v. Morran, 131 M 17, 306 P 2d 679.

Injury to Perpetrator of Crime

A bartender who worked after hours for the sole purpose of making illegal sales of liquor and signaling prostitutes as to the arrival of prospective customers was in pari delicto and could not recover from his employer for an injury received during such employment. Lencioni v. Long, 139 M 135, 361 P 2d 455.

Instructions on This Section

In a prosecution for arson, where there is some testimony that defendant procured another to set the fire, the giving of instructions, embodying the provisions of this section and section 94-6423, is proper; as is also the refusing of others, directing the jury to find for the defendant, unless they are satisfied beyond a reasonable doubt that he was present personally and set the fire himself. State v. Chevigny, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of this section and section 94-6423 defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. State v. Wiley, 53 M 383, 387, 164 P 84.

An instruction that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, are principals, correctly stated the law. State v. Peters, 72 M 12,

19, 231 P 392.

Where the evidence in a cattle-stealing case tended to show that defendant charged jointly with others had entered into a conspiracy to carry on the larceny of livestock, the giving of instructions relative to who are principals in the commission of a felony and that where a conspiracy has been proven the fact that defendant was not present at the actual taking of the animals was not available to defendant as a defense was proper as applicable to the facts. State v. Quinlan, 84 M 364, 371, 275 P 750.

Where the state in a prosecution for grand larceny proceeded on the theory that defendant was present and directly committed the crime of horse stealing, and not on the theory that he was not present but aided and abetted another, an instruction in the language of this section, defining principals as those present and directly committing the crime, or, not being present, aiding and abetting another, held not reversible error, though not approved as proper on retrial. State v. Hamilton, 87

M 353, 363, 287 P 933.

An instruction that one may be a principal in the commission of a crime though absent from the place where it was committed, held properly given where the evidence in a larceny case showed that while defendant was not actually present at the place from which personal property was stolen by two confederates, she was in her car nearby into which it was placed and taken to a hiding place, with her driving the car. State v. McComas, 89 M 187, 192, 295 P 1011.

Where a verbal declaration of one codefendant that he and the other codefendant were partners was given in evidence, it was error to refuse defendant's instruction that such verbal declaration was insufficient to establish a partnership. Although a partnership was immaterial because of this section and section 94-6423, yet the jury might have given full consideration to the declaration and found defendant guilty on the strength thereof. State v. Keller, 126 M 142, 246 P 2d 817, 821.

Kidnaping

Prison inmate who walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation was guilty of confining prison guard secretly against his will in violation of section 94-2602. State v. Frodsham, 139 M 222, 362 P 2d 413, 419.

Operation in General

Where two defendants, charged jointly with assault in the first degree, showed by their own testimony that they went to the home of the complaining witness for the purpose of ascertaining whether he had made a certain derogatory statement, whereupon one of them struck him for denying having made it, after which he confessed having made it, and thereupon the other assaulted him, each defendant was an accessory to the other and a principal in the carrying out of a common design, and therefore a requested instruction that if each was acting individually and for separate purposes and not under a common design, neither of them could be convicted, was properly refused as not applicable to the facts or warranted by their own testimony. State v. Maggert, 64 M 331, 337, 209 P 989.

One who, after the crime of larceny is completed, aids and abets another in receiving the stolen property with knowledge that it was stolen and with the intent to prevent the owner from again possessing it, is, under this section, a principal and properly prosecuted as such. State v. Huffman, 89 M 194, 200, 296 P 789.

In a prosecution for receiving stolen property of the United States government,

to wit, certain calves belonging to Indians, the state proved that the animals were stolen by two Indians who testified that defendant had given them a standing order that he would buy from them all unbranded animals they would bring to him; that they brought the animals in question to his home in the nighttime, when he stated he had no money but would aid them in taking the animals to a third person where they were received and paid for, defendant was properly charged as a principal. State v. Huffman, 89 M 194, 200, 296 P 789.

Although, under the facts stated, defendant, who apparently advised and encouraged the theft of a calf, was an accomplice or accessory before the fact and therefore a principal to the actual theft under section 94-6423 abrogating the distinction, and by legal fiction had constructive possession; since he later obtained physical possession, the state could elect to prosecute him for receiving stolen property and his contention that he could receive from himself the thing he had stolen was illogically basing further fiction upon fiction, implying that it was impossible to receive actual physical possession as distinguished from constructive possession. State v. Webber, 112 M 284, 301, 116 P 2d 679.

Under this section and section 94-6423, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. State v. Simon, 126 M 218, 247 P 2d 481,

484.

Presence at Scene of Crime

Even though there was no evidence placing defendant at scene of crime, he could be held as an accomplice in burglary prosecution in view of possession of stolen property and other corroborating evidence. State v. Gray, — M —, 447 P 2d 475.

Defendant need not have been present

Defendant need not have been present at scene of crime to be guilty of larceny. State v. Gray, — M —, 447 P 2d 475.

Collateral References

Criminal Law 59-67.

22 C.J.S. Criminal Law § 83 et seq. 21 Am. Jur. 2d 197, Criminal Law, § 121.

Abortion, criminal responsibility of one other than subject or actual perpetrator. 4 ALR 351.

Incapacity personally to commit the offense as affecting criminal responsibility of one co-operating in offense. 5 ALR 782; 74 ALR 1110 and 131 ALR 1322.

Assault, principal in second degree, or aider and abettor in case of felonious as-

sault. 16 ALR 1043.

Duress, criminal responsibility of child for act done under fear of, or compulsion

by, parent. 16 ALR 1470.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for a legitimate purpose, with knowledge that it is to be used by another for criminal purpose. 108 ALR 331.

Criminal responsibility, as principal or accessory, of one, other than driver at time of accident, under "hit-and-run" statute. 62 ALR 2d 1131.

Manslaughter, who other than actor is liable for. 95 ALR 2d 179.

Homicide, failure to provide medical or surgical attention. 100 ALR 2d 483.

94-205. (10733) Who are accessories. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor or protect the person charged with or convicted thereof, are accessories.

History: Earlier acts were Sec. 11, p. 177, Bannack Stat.; Sec. 13, p. 271, Cod. Stat. 1871; Sec. 13, 4th Div. Rev. Stat. 1879; Sec. 13, 4th Div. Comp. Stat. 1887.

This section en. Sec. 42, Pen. C. 1895; re-en. Sec. 8120, Rev. C. 1907; re-en. Sec. 10733, R. C. M. 1921. Cal. Pen. C. Sec. 32.

"Accessory" Defined

Accessories to crime are still recognized as punishable under our law, but the accessories referred to in the statute are accessories after the fact. Accessories before the fact are treated as principals. State v. De Wolfe, 29 M 415, 423, 74 P 1084, overruled on other grounds in State

v. Penna, 35 M 535, 546, 90 P 787. The term "accessory," as defined by this section, refers exclusively to an accessory after the fact. State v. Slothower, 56 M 230, 232, 182 P 270.

If Crime Misdemeanor, Vulnerable to Demurrer

Information charging one as an accessory in that he harbored and protected another with full knowledge that such other had committed a crime, held, under this section, that sufficiency thereof depends upon whether the crime constituted a felony; if the offense was no more than a misdemeanor, the pleading is vulnerable to a demurrer. State v. Williams, 106 M 516, 522, 79 P 2d 314.

Knowledge Without Action

One who, though in possession of knowledge of the fact that a felony has been committed, does nothing to conceal it or harbor or protect the offender, is not an accessory within the meaning of this section. State v. McComas, 85 M 428, 433, 278 P 993.

Collateral References

Criminal Law 75. 22 C.J.S. Criminal Law § 98. 21 Am. Jur. 2d 199-200, Criminal Law, §§ 124-126.

Married woman's criminal responsibility for harboring husband, who is a criminal. 4 ALR 281 and 71 ALR 1126.

Abortion, criminal responsibility of one other than subject or actual perpetrator. 4 ALR 351.

Incapacity personally to commit the offense as affecting the criminal responsibility of one co-operating in offense. 5 ALR 782; 74 ALR 1110 and 131 ALR 1322.

Criminal responsibility of one who furnishes instrumentality of a kind ordinarily used for a legitimate purpose, with knowledge that it is to be used by another for criminal purpose. 108 ALR 331.

Financial assistance, charge of harboring or concealing or assisting one charged with crime to avoid arrest predicated upon. 130 ALR 150.

Larceny or theft, may accessory to, be convicted of offenses of receiving or concealing the stolen property. 136 ALR 1087.

Criminal responsibility, as principal or accessory, of one, other than driver at time of accident, under "hit-and-run" statute. 62 ALR 2d 1131.

Manslaughter, who other than actor is liable for. 95 ALR 2d 175.

Homicide: Liability as accessory for failure to provide medical or surgical attention. 100 ALR 2d 493, 508, 514.

94-206. (10734) Punishment of accessories. Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars.

History: En. Sec. 43, Pen. C. 1895; re-en. Sec. 8121, Rev. C. 1907; re-en. Sec. 10734, R. C. M. 1921. Cal. Pen. C. Sec. 33.

Collateral References

Criminal Law \$2.

22 C.J.S. Criminal Law §§ 104, 105.

CHAPTER 3

ABANDONMENT AND NEGLECT OF WIFE AND CHILDREN

Abandonment or failure to support wife-penalty for.

94-302. Orders which may be entered by the court. Certain proof made prima facie evidence.

Desertion or abandonment of child or ward a felony-suspension of sentence, when.

94-305. Disposing of child for mendicant business.

94-306. Cruelty to children.

94-301. (11017) Abandonment or failure to support wife—penalty for. Every person, having sufficient ability to provide for his wife's support, or who is able to earn the means for such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical attendance, unless in the judgment of the court or jury he is justified in abandoning her by her misconduct, shall be guilty of a misdemeanor.

History: En. Sec. 470, Pen. C. 1895; re-en. Sec. 8345, Rev. C. 1907; amd. Sec. 1, Ch. 77, L. 1917; re-en. Sec. 11017, R. C. M. 1921; amd. Sec. 1, Ch. 179, L. 1963. Cal. Pen. C. Sec. 270.

Collateral References

Husband and Wife@302; Parent and

Child 17 (1). 42 C.J.S. Husband and Wife §§ 631, 632, 634, 653, 655; 67 C.J.S. Parent and Child § 91 et seq.

41 Am. Jur. 2d 24, 270 et seq., Husband and Wife, §§ 8, 329 et seq.; 39 Am. Jur. 749 et seq., Parent and Child, § 102 et seq.

Criminal liability of father for failure to support child who is living apart from him without his consent. 23 ALR 864. Criminal responsibility for abandonment

or nonsupport of children who are being cared for by charitable institution. 24 ALR 1075.

Abandonment of adopted child. 44 ALR

- (11018) Orders which may be entered by the court. In any case enumerated in the previous section, the court may render one of the following orders:
- 1. Should a fine be imposed, it may be directed by the court to be paid in whole or in part to the wife, or to the guardian or custodian of the child or children, or to an individual appointed by the court as trustee.
- Before trial, or after conviction, with the consent of the defendant, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly, during such time as the court may direct, to the wife, or to the guardian, or to the custodian of the minor child or children, or to an individual appointed by the court, and to release the defendant from custody or probation during such time as the court may direct, upon his or her entering into an undertaking, with or without sureties, in such sum as the court may direct; the condition of the undertaking to be such that if the defendant shall make his or her appearance in court whenever ordered to do so, and shall further comply with the terms of the order, and of any subsequent modification thereof, then the undertaking shall be void, otherwise to remain in full force and effect.

3. Where conviction is had, and sentence to imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon public roads or highways, during the time of such sentence, or such other work as the court may order, and it shall be the duty of the board of county commissioners of the county where such conviction and sentence is had, and where such work is performed by persons under sentence to the county jail, to allow and order the payment out of the current fund, to the wife, or to the guardian, or to the custodian of the child or children, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, child or children, ward or wards, the current wages paid for such labor, less the expense incurred by the county for the maintenance and safe-keeping of such convicted person.

History: En. Sec. 2, Ch. 77, L. 1917; re-en. Sec. 11018, R. C. M. 1921.

Cross-Reference

Enforcement of support orders of other states, secs. 93-2601-41 to 93-2601-82.

Collateral References

Husband and Wife ≈315, 316; Parent and Child ≈17 (7½).
42 C.J.S. Husband and Wife §§ 638, 642, 644, 646, 647, 649, 652; 67 C.J.S. Parent and Child §91 et seq.

94-303. (11019) Certain proof made prima facie evidence. Proof of the abandonment or nonsupport of a wife, or the omission to furnish necessary food, clothing, shelter, or medical attendance for a child or children, ward or wards, is prima facie evidence that such abandonment or nonsupport or omission to furnish necessary food, clothing, shelter, or medical attendance is willful.

History: En. Sec. 3, Ch. 77, L. 1917; re-en. Sec. 11019, R. C. M. 1921.

Collateral References

Husband and Wife ≈313; Parent and Child ≈17 (6).
42 C.J.S. Husband and Wife §§ 640, 657.

- 94-304. (11020) Desertion or abandonment of child or ward a felony—suspension of sentence, when. Any person who has a child or ward under the age of sixteen (16) years who is dependent upon him or her for care or support shall not:
- (1) Desert or abandon such child or ward without providing necessary and proper shelter, food, clothing and medical care for such child or ward; or
- (2) Willfully omit, without lawful excuse, to provide necessary and proper shelter, food, clothing and medical care for such child or ward.

A person who violates this section is guilty of a felony and shall, upon conviction, be punished by imprisonment for not less than one (1) year nor more than five (5) years in the state prison. The court may suspend such sentence if the defendant shall furnish a bond in such penal sum, and with such surety or sureties as the court may fix, conditioned that he will furnish his child or ward with necessary and proper shelter, food, care, and clothing. In case of failure to comply with the conditions of such bond, the court may order such person to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence or may modify the order and take a new bond and further suspend sentence as may be just and proper. The judge may declare a

bond forfeited and may, in his discretion, order the face amount of such bond used to support the persons deserted, abandoned or neglected.

History: En. Sec. 471, Pen. C. 1895; amd. Sec. 1, Ch. 6, L. 1905; re-en. Sec. 8346, Rev. C. 1907; amd. Sec. 1, Ch. 68, L. 1917; re-en. Sec. 11020, R. C. M. 1921; amd. Sec. 2, Ch. 179, L. 1963. Cal. Pen. C. Sec. 270b.

Cross-Reference

Child neglect, punishment, sec. 10-511.

Change of Plea of Guilty

Where defendant was charged with desertion of minor children and upon arraignment the defendant indicated that he wanted to plead guilty and court read him this section making it a felony to desert and abandon children under 15 years of age, and also sections 94-301 and

94-302 which make it a misdemeanor to omit without lawful excuse to furnish necessary board, clothing, shelter or medical attention to children under the age of 16 years, the court abused its discretion in refusing to grant the defendant's motion to change his plea of guilty since there was a misunderstanding as to what the defendant pleaded guilty. State v. McBane, 128 M 369, 275 P 2d 218, (Dissenting opinion, 128 M 369, 275 P 2d 218, 222.)

Collateral References

Parent and Child 17 (1) (7½). 67 C.J.S. Parent and Child § 91 et seq. 39 Am. Jur. 750 et seq., Parent and Child, § 103 et seq.

94-305. (11021) Disposing of child for mendicant business. Any person, whether as parent, relative, guardian, employer or otherwise, having in his care, custody, or control any child under the age of sixteen years, who shall sell, apprentice, give away, let out, or otherwise dispose of any such child to any person, under any name, title, or pretense, for the vocation, use, occupation, calling, service, or purpose of singing, playing on musical instruments, ropewalking, dancing, begging, or peddling in any public street or highway, or in any mendicant or wandering business whatever, and any person who shall take, receive, hire, employ, use, or have in custody any child for such purposes, or either of them, is guilty of a misdemeanor.

History: Ap. p. Sec. 13, 5th Div. Comp. Stat. 1887; en. Sec. 472, Pen. C. 1895; re-en. Sec. 8347, Rev. C. 1907; re-en. Sec. 11021, R. C. M. 1921. Cal. Pen. C. Sec. 272.

Collateral References

Infants ← 20. 43 C.J.S. Infants § 11 et seq. 39 Am. Jur. 749, Parent and Child, § 102.

94-306. (11022) Cruelty to children. Every person who has the legal care or custody of an infant, minor child, or apprentice, and cruelly treats, abuses, or inflicts unnecessary and cruel punishment upon the same, or willfully abandons or neglects such child, is guilty of a misdemeanor.

History: Ap. p. Sec. 11, 5th Div. Comp. Stat. 1887; amd. Sec. 473, Pen. C. 1895; en. Sec. 2, Ch. 6, L. 1905; re-en. Sec. 8348, Rev. C. 1907; re-en. Sec. 11022, R. C. M. 1921.

Collateral References

Failure to provide medical attention for child as criminal negligence. 12 ALR 2d 1047.

CHAPTER 4

ABORTION

Section 94-401. Administering drugs, etc., with intent to produce miscarriage. 94-402. Submitting to an attempt to produce miscarriage.

94-401. (11023) Administering drugs, etc., with intent to produce miscarriage. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or

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substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

History: En. Sec. 41, p. 184, Bannack Stat.; amd. Sec. 42, p. 276, Cod. Stat. 1871; re-en. Sec. 42, 4th Div. Rev. Stat. 1879; re-en. Sec. 42, 4th Div. Comp. Stat. 1887; amd. Sec. 480, Pen. C. 1895; re-en. Sec. 8351, Rev. C. 1907; re-en. Sec. 11023, R. C. M. 1921. Cal. Pen. C. Sec. 274.

Cross-Reference

Advertising to produce miscarriage, penalty, sec. 94-3609.

Collateral References

Abortion 2.

1 C.J.S. Abortion § 3 et seq. 1 Am. Jur. 2d 194, Abortion, § 13.

Criminal responsibility of one other than subject or actual perpetrator of abortion. 5 ALR 351.

Conspiracy, criminal responsibility of one on whom abortion is committed for conspiring to commit the crime. 5 ALR 788; 74 ALR 1110 and 131 ALR 1322.

Evidence in prosecution for homicide in attempting to produce abortion, of dying declarations with respect to transactions prior to the homicide. 14 ALR 760.

Dying declaration, admissibility of, in prosecution for abortion. 49 ALR 1285; 91 ALR 560 and 47 ALR 2d 526.

Revocation of license of physician or surgeon for performing abortion or giving information as to abortion, 54 ALR 1504 and 82 ALR 1184, 1186.

Admissibility of evidence of commission of similar crimes in prosecution based on abortion. 15 ALR 2d 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. 16 ALR 2d 949.

Right of action for injury to or death of woman who consented to abortion, 21 ALR 2d 369.

Pregnancy as element of abortion or homicide based thereon. 46 ALR 2d 1393. Entrapment to commit offense of or

attempted abortion. 53 ALR 2d 1156. Availability of defense of entrapment where one accused of abortion denies participation in offense. 61 ALR 2d 677.

Physician and patient, applicability in criminal proceedings of privilege as to communications between. 7 ALR 3d 1458.

94-402. (11024) Submitting to an attempt to produce miscarriage. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 481, Pen. C. 1895; re-en. Sec. 8352, Rev. C. 1907; re-en. Sec. 11024, R. C. M. 1921. Cal. Pen. C. Sec. 275.

CHAPTER 5

ARSON-MODEL ARSON LAW

Section 94-501. Purpose of act—short title.

94-502. Arson-first degree-burning of dwellings.

Arson—second degree—burning of buildings, etc., other than dwellings.

94-504.

Arson—third degree—burning of other property.

Arson—fourth degree—attempt to burn buildings or property.

94-506. Burning to defraud insurer.

94-501. Purpose of act—short title. The purpose of this act is to cooperate with local, state and federal governments, in the public welfare, in the prosecution of crimes against property, in the protection of life and property, and as a means of decreasing the criminal activity of arsonists and "firebugs." This act may be referred to as the "Model Arson Law."

History: En. Sec. 1, Ch. 271, L. 1947. Collateral References

Arson = 2 et seq.

6 C.J.S. Arson § 2 et seq. 5 Am. Jur. 2d 801, Arson and Other Related Offenses, § 1.

Burning as element of offense. 1 ALR

Criminal responsibility of one co-operating in offense of arson which he is incapable of committing personally. 5 ALR 783; 74 ALR 1110 and 131 ALR 1322.

Ownership of property as affecting criminal liability for burning thereof. 17

ALR 1168.

Intent as essential element of crime of burning property to defraud insurer. 17 ALR 1180.

Ratification or sanction by owner of property or interest therein as affecting criminal responsibility of person burning same. 54 ALR 1236.

Evidence of other offenses in prosecu-

tion for arson. 63 ALR 605.

Entrapment to commit arson. 66 ALR 483 and 86 ALR 263.

Death resulting from arson as within contemplation of statute making homicide a perpetration of felony murder in first degree. 87 ALR 414.

94-502. Arson — first degree — burning of dwellings. Any person who willfully, feloniously and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson in the first degree, and upon conviction thereof, be sentenced to imprisonment in the state prison for not less than two (2) nor more than twenty (20) years.

History: En. Sec. 2, Ch. 271, L. 1947.

Cross-Reference

Burning buildings not subject of arson, penalty, sec. 94-3303.

Collateral References

Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson. 44 ALR 2d 1456.

94-503. Arson—second degree—burning of buildings, etc., other than dwellings. Any person who willfully, feloniously and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of arson in the second degree, and upon conviction thereon, be sentenced to imprisonment in the state prison for not less than one (1) nor more than ten (10) years.

History: En. Sec. 3, Ch. 271, L. 1947.

94-504. Arson—third degree—burning of other property. Any person who willfully, feloniously and maliciously sets fire to or burns, or causes to be burned or who aids, counsels or procures the burning of any personal property of whatsoever class or character, (such property being of the value of twenty-five dollars (\$25.00) and the property of another person), shall be guilty of arson in the third degree and, upon conviction thereof, be sentenced to imprisonment in the state prison for not less than one (1) nor more than three (3) years.

History: En. Sec. 4, Ch. 271, L. 1947.

94-505. Arson—fourth degree—attempt to burn buildings or property. (a) Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any

act preliminary thereto, or in the furtherance thereof, shall be guilty of arson in the fourth degree and, upon conviction thereof, be sentenced to imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding five hundred dollars (\$500.00), or both.

(b) Definition of an attempt to burn. The placing or distributing of any flammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall for the purposes of this act constitute an attempt to burn such building or property.

History: En. Sec. 5, Ch. 271, L. 1947.

94-506. Burning to defraud insurer. Any person who willfully, feloniously and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who willfully, maliciously and feloniously aids, counsels or procures the burning of any buildings, structure or personal property, of whatsoever class or character, whether the property of himself or of another, which shall at the time be insured by any person, company, or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to imprisonment in the state prison for not less than one (1) nor more than five (5) years.

History: En. Sec. 6, Ch. 271, L. 1947. Cross-Reference State fire marshal's duty, sec. 82-1213.

CHAPTER 6

ASSAULTS

Section 94-601. Assault in the first degree defined—penalty. 94-602. Assault in second degree.

94-603. Assault in third degree.

94-604. Assaults with caustic chemicals, etc.

94-605. Use of force not unlawful.

94-601. (10976) Assault in the first degree defined—penalty. Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted or of another:

1. Assaults another with a loaded firearm, or any other deadly weapon, or by any other means or force likely to produce death; or,

2. Administers or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

is guilty of assault in the first degree, and is punishable by imprisonment in the state prison not less than five nor more than twenty years.

History: Earlier acts were Secs. 45-47, p. 185, Bannack Stat.; Secs. 55-59, p. 278, Cod. Stat. 1871; Secs. 55-59, 4th Div. Rev. Stat. 1879; Secs. 58-62, 4th Div. Comp. Stat. 1887.

This section en. Sec. 400, Pen. C. 1895; re-en. Sec. 8312, Rev. C. 1907; amd. Sec. 1, Ch. 5, L. 1911; re-en. Sec. 10976, R. C. M. 1921. Cal. Pen. C. Secs. 217, 245.

Cross-Reference

Poisoning food or water, penalty, sec. 94-35-255.

Criminal Intent

The element of felonious intent in every contested criminal case must necessarily be determined from the facts and circumstances of the particular case, this for the reason that criminal intent, being a state of mind, is rarely susceptible of direct or positive proof and therefore must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. State v. Madden, 128 M 408, 276 P 2d 974, 978.

Evidence of Intent

Finding that defendant was able to form specific intent to commit first degree assault was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty in recounting recent events to police. State v. Lukus, 149 M 45, 423 P 2d 49.

Guilt of Lesser Degree Jury Question

In a prosecution for assault in the first degree, the court may properly submit to the jury the question whether, on the evidence, the defendant, if not guilty as charged, was not guilty of assault in the second degree. State v. Papp, 51 M 405, 409, 153 P 279.

Instructions on Intent

In prosecution for first-degree assault, instruction dealing with intent and proof thereof was properly given since intent is essential element of crime and must be proven. State v. Gallagher, 151 M 501, 445 P 2d 45.

Intent To Commit Felony

In prosecution for assault in first or second degree, prosecution had to prove by satisfactory evidence, that when defendant pointed gun at a person he intended to commit a felony upon that person; instructions defining the felony must be given so that jury can determine if evidence showed such intended felony. State v. Quinlan, 126 M 52, 244 P 2d 1058, 1059. (Dissenting opinion, 126 M 52, 56, 244 P 2d 1058, 1060, 1063).

Intent To Kill

In cases of assault of the first degree, where the specific charge in the information is "assault with intent to kill," the instruction should omit all reference to murder or manslaughter, and advise juries, in lieu thereof, that, to sustain the information, they must find, beyond a reasonable doubt, that the assault was committed

with intent to kill. State v. Schaefer, 35 M 217, 222, 88 P 792.

Penalty

Defendant was properly given 18 year sentence for assault in first degree where he plead guilty to three prior felony convictions. State v. McLeod, 131 M 478, 311 P 2d 400, 408.

Sufficiency of Charge

An information charging assault in the first degree with a deadly weapon was sufficient, the words following descriptive of the weapon, "to wit, an instrument about a foot long with a knob on the striking end," being surplusage, the only effect of which was to confine the prosecution to proof that the assault was committed with the instrument described and not with some other. State v. Maggert, 64 M 331, 334, 209 P 989.

Amended information complying with rules of pleading was not subject to demurrer or dismissal and evidence introduced thereunder was not subject to objection. State v. McLeod, 131 M 478, 311 P 2d 400, 406.

Collateral References

Assault and Battery \$\infty\$60; Homicide \$\infty\$ 84.

6 C.J.S. Assault and Battery § 59; 40 C.J.S. Homicide §§ 73, 74, 84, 85. 6 Am. Jur. 2d 48 et seq., Assault and

Battery, § 50 et seq.

Arresting one charged with misdemeanor, degree of force that may be employed. 3 ALR 1170 and 42 ALR 1200.

Firearm used as a bludgeon as a deadly weapon. 8 ALR 1319.

Principal in second degree or aider and abettor in case of felonious assault, necessity of intent or malice to render one liable as. 16 ALR 1045.

Peace officers' criminal responsibility for wounding one whom they wish to investigate or identify. 18 ALR 1368 and 61 ALR 321.

Assault in defense of habitation or property. 25 ALR 537; 32 ALR 1541 and 34 ALR 1488.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault, 27 ALR 859.

Cane as deadly weapon. 30 ALR 815. Kicking as an aggravated assault, or an assault with a deadly weapon. 33 ALR 1186.

Illegal arrest, right of self-defense by officer attempting. 46 ALR 904.

Unloaded firearm as dangerous weapon. 74 ALR 1206.

"Third degree," police officers' criminal liability in respect of examination of persons under arrest. 79 ALR 457.

Automobiles: homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law. 99 ALR 756.

Danger or apparent danger of death or great bodily harm as condition of right

of self-defense. 114 ALR 634.

Instruction applying rule of reasonable doubt with respect to defendant's claim of self-defense as curing instruction placing burden of proof upon defendant in that regard. 120 ALR 595.

Automobile as deadly weapon, 129 ALR

Right to use force to obtain possession of real property to which one is entitled. 141 ALR 276.

Indecent proposal to a woman as a criminal assault. 12 ALR 2d 971.

Malice or intent to kill where killing is by blow without weapon. 22 ALR 2d

Criminal responsibility for injury resulting from hunting accident. 23 ALR 2d

Use of set gun, trap, or similar device on defendant's own property. 44 ALR 2d

Robbery or assault to commit robbery as affected by intent to secure debt or claim. 46 ALR 2d 1227.

Excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, criminal liability. 89 ALR 2d 396.

Character or reputation for turbulence on question of self-defense by one charged with assault or homicide, admissibility of evidence as to other's. 1 ALR 3d 571.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense. 9 ALR 3d 933.

- (10977) Assault in second degree. Every person who, under circumstances not amounting to the offense specified in the last section:
- (1) With intent to injure unlawfully, administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health; or,
- With intent thereby to enable or assist himself, or any other person, to commit any crime, administers to, or causes to be administered to, or taken, by another, chloroform, ether, laudanum, or any other intoxicating narcotic, or anesthetic agent; or,
- (3) Willfully or wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or,
- Willfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or,
- Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

is guilty of an assault in the second degree, and is punishable by imprisonment in the state prison for not less than one nor more than six years, or by a fine not exceeding two thousand dollars, or both.

History: En. Sec. 401, Pen. C. 1895; re-en. Sec. 8313, Rev. C. 1907; re-en. Sec. 10977, R. C. M. 1921; amd. Sec. 1, Ch. 129, L. 1961. Cal. Pen. C. Secs. 216, 222, and 245.

Essential Elements

Under this section, to constitute an assault other than one which involves a technical battery without which the offense is not complete, there must be present both the element of attempt and the element of present ability to inflict the injury. The absence of the latter element does not prevent a conviction for the attempt, for under a charge of assault, the defendant may be convicted either of the assault or of the attempt, because the former includes all the elements of the latter. State v. Stone, 40 M 88, 91, 105 P 89.

"Feloniously" Not To Replace "Willfully" or "Wrongfully"

In charging the crime of assault in the second degree which is the willful or wrongful wounding or inflicting grievous bodily harm upon another, either with or without a weapon, the use of the word "feloniously" does not take the place of "willfully" or "wrongfully." State v. Williams, 106 M 516, 525, 79 P 2d 314.

Instructions on This Section

Where one charged with assault in the second degree was convicted of that crime in the third degree, he was not prejudiced by an instruction which comprised all of the subdivisions of this section, setting forth the various circumstances under which the crime in the higher degree may be committed. State v. Farnham, 35 M 375, 378, 89 P 728.

An instruction in a prosecution for assault in the second degree that if the jury believed that defendant exhibited a pistol to the complaining witness and threatened to kill him, and that the pistol was a weapon likely to produce grievous bodily harm, that defendant was then within shooting distance of the witness, that the latter was actually put in fear of injury and the circumstances were such as ordinarily to induce fear in the mind of a reasonable man, defendant should be found guilty, correctly stated the law. State v. Karri, 84 M 130, 137, 276 P 427.

Assault with intent to commit a felony (rape) constituting, under subdivision 5, assault in the second degree, an instruction given in a case in which the information charged assault with intent to commit a felony, to wit, rape, that the jury could find defendant guilty of either assault in the second degree or not guilty, was correct, as against the contention that the instruction should have been that defendant was either guilty of assault with intent to commit rape or not guilty. State v. Collins, 88 M 514, 528, 294 P 957.

Instruction defining term "grievous bodily harm" as used in subdivision 3, to the effect that such harm would include any injury calculated to interfere with the health or comfort of the person injured, and that the word "grievous" means atrocious, aggravated, harmful, painful, hard to bear and serious in nature, held proper. State v. Laughlin, 105 M 490, 494, 73 P 2d 718.

Where the facts disclosed by the evidence under an information charging first degree assault constituted at least a second degree assault, as found by the jury, or no offense at all, contention that the court erred in failing to give an instruction on third degree assault, held not meritorious, particularly where the record did not disclose any request for such an instruction. State v. Satterfield, 114 M 122, 127, 132 P 2d 372.

Instructions defining the felony intended to be committed must be given to jury in a first or second degree assault

prosecution so that jury may determine if the evidence shows an intended felony. State v. Quinlan, 126 M 52, 244 P 2d 1058, 1059.

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault as defined in subdivision (4) of this section which requires only general nonstatutory intent to do harm willfully, wrongfully and unlawfully and does not require specific statutory intent to do any particular kind or degree of injury to victim. State v. Fitzpatrick, 149 M 400, 427 P 2d 300.

Specific intent is not a necessary element of crime of second degree assault in willful or wrongful infliction of grievous bodily harm upon another, and court properly refused instruction thereon notwithstanding statute providing that there must be unity of act and intent since latter statute is not applicable if specific intent is not an ingredient of crime charged. State v. Warrick, — M —, 446 P 2d 916.

Since specific intent is not an element of second degree assault in willful and wrongful infliction of grievous bodily harm upon another, court was correct in refusing offered instruction that jury could take defendant's degree of intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent. State v. Warrick, — M —, 446 P 2d 916.

Operation and Effect

Evidence was insufficient to justify a conviction of second degree assault with a deadly weapon where it was disclosed that the defendant was hunting jack rabbits at the time; that he never knew the prosecuting witness prior to the day of the alleged assault; that the rifle was extremely sensitive and would fire upon being brushed against an object such as clothing or even a change in temperature might fire the gun; and that the defendant was an instructor in firearms in the army during the war and would not have missed from the distance of eight feet had he been aiming at the prosecuting witness. State v. Smith, 126 M 124, 246 P 2d 227, 228.

Evidence was sufficient to justify a conviction under this section when it was shown that defendant was with a group of boys who fired a barrage of shots at a house and some of the pellets hit the house; fact that prosecuting witness had moved to a position away from line of fire did not prevent the attack from being an assault upon him. State v. Simon, 126 M 218, 247 P 2d 481, 482, 483, 484.

Proof of Offense Different Than That Charged

Where defendant was charged with assault in the second degree as defined in subdivision 4, it was error to introduce evidence that defendant in pointing firearm was resisting a lawful arrest by sheriff in violation of subdivision 5. State v. Storm, 124 M 102, 220 P 2d 674, 675.

Specific Intent

Specific intent needs to be proved in second degree assault charges only under subdivisions 1, 2 and 5 of this section. State v. Straight, 136 M 255, 347 P 2d 482, 487.

Sufficiency of Charge

It is not necessary to allege, in an information for an assault and battery in the second degree, as defined in subdivision 3, that "the assault was committed with the intent to inflict grievous bodily harm," because the statutes do not include the word "intent" in defining the crime. State v. Broadbent, 19 M 467, 471, 48 P 775. See also State v. Bloor, 20 M 574, 583, 52 P 611; State ex rel. Webb v. District Court, 37 M 191, 197, 95 P 593.

An information charging defendant with having willfully, unlawfully, and feloniously assaulted a person with a piece of iron pipe, with intent to inflict grievous bodily harm, was sufficient to charge the defendant with an assault with intent to commit a felony, and gave the district court jurisdiction to try the cause. State v. Farnham, 35 M 375, 377, 89 P 728.

An information charging that defendant "did willfully, unlawfully, wrongfully, intentionally, and feloniously assault one S., by throwing said S. from a moving street-car, with intent in him, the said defendant, to inflict grievous bodily harm upon said S.," was sufficient to charge assault in the second degree, under subdivision 3. State v. Tracey, 35 M 552, 554, 90 P 791.

Information charging defendant with unlawfully threatening another by pointing a loaded revolver at him charged a criminal offense. State v. Storm, 124 M 102, 220 P 2d 674, 675.

Information charging that defendant committed assault in the second degree by willfully, wrongfully, unlawfully, and feloniously assaulting a human being by wounding and inflicting grievous bodily harm contrary to form, force and effect of statute, was sufficient to let defendant know specifically the crime with which he was charged. State v. Straight, 136 M 255, 347 P 2d 482, 486.

Even though, in an information charging second degree assault, it was not

charged specifically that a belt was used in the assault, admission of evidence that a belt was used was not error. State v. Straight, 136 M 255, 347 P 2d 482, 487.

Denial of state's second application for leave to file information charging assault on ground that probable cause was not shown was an abuse of discretion where supplementary proof as to probable cause in the form of affidavits of deputy county attorney and six witnesses and copy of police report were filed, the district court, in denying first application for failure to have witnesses endorsed thereon having commented that probable cause existed. State ex rel. McLatchy v. District Court, 144 M 216, 395 P 2d 245, 248.

While mere recital of injuries was not medically precise or overwhelmingly persuasive, but did show that injuries had been inflicted and that doctor, who was to testify at trial, had examined the victim, there was sufficient evidence stated in the information to establish probable cause that a second degree assault had been committed. State ex rel. Pinsoneault v. District Court, 145 M 233, 400 P 2d 269.

Under section 94-6423 information containing single count charging second degree assault was proper where only that crime was involved with at least two different ways of committing it; one by a direct assault and the other by aiding and abetting. State v. Zadick, 148 M 296, 419 P 2d 749, 751.

Sufficiency of Evidence

Where evidence did not show that defendant pointed gun at sheriff after he was handed paper by deputy which purported to be a warrant, evidence was insufficient to support a conviction under either subdivision 4 or 5. State v. Storm, 124 M 102, 220 P 2d 674, 678.

Verdict of Guilty of Lesser Degree Than Charged

Where defendant, charged with assault in the first degree (allegedly committed with a loaded rifle with intent to kill) under section 94-601, admitted on the stand that, using the rifle as a club, he had struck the complaining witness on the head several times, and the injured person had testified that several shots had been fired by defendant, held, that although the testimony of an officer that he found bullet holes in the cabin was based on his inspection the day before trial while the affray took place three and a half months before it could not have been prejudicial where the jury found defendant guilty of second degree assault without justification. State v. Satterfield, 114 M 122, 126, 132 P 2d 372.

94-603. (10978) Assault in third degree. Every person who commits an assault or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of assault in the third degree, and is punishable by imprisonment in the county jail not more than six months, or by a fine not more than five hundred dollars, or both.

History: En. Sec. 402, Pen. C. 1895; re-en. Sec. 8314, Rev. C. 1907; re-en. Sec. 10978, R. C. M. 1921.

Cross-Reference

Cruel treatment of insane persons, penalty, sec. 94-3541.

Instructions

Where the evidence introduced showed that defendant was guilty of assault in the second degree or not guilty at all, and there was none warranting an instruction on the law applicable to assault in the third degree as defined in this section, the giving of such an instruction was error. State v. Karri, 84 M 130, 137, 276 P 427.

In a prosecution for third degree assault, defendant contending that the prosecuting witness (a woman) was at the time trespassing upon his land though repeatedly warned from going thereon, instruction in the words of subdivision 3, section 94-605, stating in effect that the owner of the premises may prevent a trespass by force if the force used be no more than necessary for that purpose, held sufficient against defendant's contention that the court of its own motion should have instructed the jury that it was not necessary

for defendant to wait for the commission of an overt act on her part before ejecting her forcibly after previous warning. State v. Kline, 113 M 180, 184, 123 P 2d 304.

It was error to refuse defendant's instructions defining assault in the third degree, and instead instructing the jury as to assault in the first and second degree but omitting any instructions defining what felony was intended to be committed by assaulting a person with a gun. Since the jury had no way of knowing what felony, if any, the defendant intended to commit upon a person by pointing a gun at him, the jury should have been allowed to consider whether or not defendant was guilty of third degree assault. State v. Quinlan, 126 M 52, 244 P 2d 1058, 1059.

Operation and Effect

A verdict finding a defendant guilty of an assault with corrosive acids and caustic chemicals, which fails to find that the assault is committed willfully or maliciously, or with intent to injure, is a verdict of guilty of assault in the third degree. State v. District Court, 35 M 321, 324, 89 P 63.

94-604. (10979) Assaults with caustic chemicals, etc. Every person who willfully and maliciously places or throws, or causes to be placed or thrown upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 403, Pen. C. 1895; re-en. Sec. 8315, Rev. C. 1907; re-en. Sec. 10979, R. C. M. 1921. Cal. Pen. C. Sec. 244.

Necessary Elements

Willfulness, malice, and intent to injure are necessary to constitute an assault, with corrosive acids or caustic chemicals, a felony; and, in the absence of a finding as to these necessary requisites, a verdict

finding the defendant guilty of an assault with corrosive acids and caustic chemicals will not support a conviction for a felony. State v. District Court, 35 M 321, 323, 89 P 63.

Collateral References

Mayhem by use of poison or acid. 58 ALR 1328.

- 94-605. (10980) Use of force not unlawful. To use or attempt or offer to use force or violence upon or towards the person of another is not unlawful in the following cases:
- 1. When necessarily committed by a public officer in the performance of a legal duty, or by any other person assisting him or acting under his direction.

- 2. When necessarily committed by any person in arresting one who has committed a felony and delivering him to a public officer competent to receive him in custody.
- 3. When committed either by the party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his possession, if the force or violence used is not more than sufficient to prevent such offense.
- 4. When committed by a parent, or an authorized agent of any parent, or by a guardian, master, or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice, or pupil, and the force or violence used is reasonable in manner and moderate in degree.
- 5. When committed by a carrier of passengers, or the authorized agent or servants of such carrier, or by any person assisting them at their request in expelling from a carriage, coach, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped at any usual stopping place or near any dwelling house, and the force or violence used is not more than sufficient to expel the offending passenger with a reasonable regard to his personal safety.
- 6. When committed by any person when preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of their reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint and custody of his person.

History: En. Sec. 404, Pen. C. 1895; re-en. Sec. 8316, Rev. C. 1907; re-en. Sec. 10980, R. C. M. 1921.

Defense of Home

Evidence failed to justify a conviction of assault with a deadly weapon when it was shown that the defendant was merely exercising force in defense of his home, inasmuch as the prosecuting witness came to defendant's cabin in the company of another fellow who had intruded in defendant's home and lived there without defendant permission and who the defendant had to forcibly evict, and also someone had been stealing log poles from the defendant. State v. Nickerson, 126 M 157, 247 P 2d 188, 192, 193.

Defense of Property

Evidence held to show that the defendant had been in possession of the premises, as owner thereof, for months, and that, under subdivision 3, he had the right to defend such possession, provided he used no more force than was necessary for that purpose; and that it was error to refuse an instruction to that effect. State v. Howell, 21 M 165, 169, 53 P 314.

In a prosecution for assault where the trial court failed in all of its instructions to advise the jury on the law of self-defense, but because of the state of the record such error was not reviewable, judgment nevertheless reversed for refusal of an instruction correctly stating the law. State v. Daw, 99 M 232, 238, 43 P 2d 240.

Excessive Force—Preventing Trespass

In prosecution for first degree assault, defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force. State v. Lukus, 149 M 45, 423 P 2d 49.

Intent

Under this section, in order to convict one standing in loco parentis of assault upon a child, it is not necessary to prove either express or implied malice or permanent injury. It is up to the jury to determine from the facts and circumstances of each individual case whether the manner of punishment is reasonable and the degree moderate. State v. Straight, 136 M 255, 347 P 2d 482, 490.

Right To Kill Game in Defense of Person or Property

On appeal from a conviction of killing an elk out of season, the defense was predicated upon sections 3, 13 and 29, article III of the constitution; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, section 64-210, must be construed in pari materia with section 26-307 when the latter is found inoperative, otherwise the latter would be unconstitutional as denving an inalienable right. State v. Rathbone, 110 M 225, 237, 100 P 2d 86.

Self-Defense

The law of self-defense is applicable in a case where defendant is charged with feloniously shooting the complaining witness; where a person is assaulted in such

a manner as to induce in him a reasonable belief of danger of losing his life or suffering great bodily harm, he is justified in defending himself though the danger be not real but only apparent and, if the circumstances were such that a reasonable man would have acted as defendant did, he will be held blameless. State v. Daw, 99 M 232, 238, 43 P 2d 240.

Where the evidence in a prosecution for assault warrants the giving of instructions on self-defense relating to the rights of defendant in resisting an attack by three or more persons committing a tumultuous trespass, the court should point out to the jury the essential differences between an assault by such a body of men and that by an individual. State v. Daw, 99 M 232, 238, 43 P 2d 240.

Collateral References

Assault and Battery \$\infty\$63 et seq. 6 C.J.S. Assault and Battery § 86 et seq. 6 Am. Jur. 2d 40 et seq., Assault and Battery, § 43 et seq.

CHAPTER 7

BIGAMY AND INCEST

Section 94-701. Bigamy defined.

94-702. Exceptions.

94-703. Punishment of bigamy.

Marrying a husband or wife of another.

94-705. Incest.

94-701. (11025) Bigamy defined. Every person having a husband or wife living who marries any other person, except in the cases specified in the next section, is guilty of bigamy.

History: Earlier acts were Sec. 126, p. 208, Bannack Stat.; re-en. Sec. 140, p. 302, Cod. Stat. 1871; re-en. Sec. 140, 4th Div. Rev. Stat. 1879; re-en. Sec. 155, 4th Div. Comp. Stat. 1887.

This section en. Sec. 490, Pen. C. 1895; re-en. Sec. 8353, Rev. C. 1907; re-en. Sec. 11025, R. C. M. 1921. Cal. Pen. C. Sec. 281.

Cross-Reference

Evidence on trial, sec. 94-7214.

Collateral References

Bigamv€=1.

10 C.J.S. Bigamy § 1.

10 Am. Jur. 2d 969 et seq., Bigamy, § 1 et seq.

Criminal responsibility of single person who marries one already married. 5 ALR 783; 74 ALR 1110 and 131 ALR 1322. Religious belief as affecting crime of

bigamy. 24 ALR 1237.

Place where second or later marriage is celebrated as affecting bigamy. ALR 1036.

Evidence in prosecution for bigamy of decree of divorce or annulment. 87 ALR

Effect of exceptions and provisos in bigamy statutes. 144 ALR 759. Mistaken belief in existence, validity or

effect of divorce or separation as defense to prosecution for bigamy. 56 ALR 2d 95.

Divorce, construction of statute making bigamy or prior lawful subsisting marriage to third person a ground for. 3 ALR 3d 1108.

94-702. (11026) Exceptions. The last section does not extend:

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years, without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled or dissolved by the judgment of a competent court.

History: Earlier acts were Sec. 126, p. 208, Bannack Stat.; re-en. Sec. 140, p. 302, Cod. Stat. 1871; re-en. Sec. 140, 4th Div. Rev. Stat. 1879; re-en. Sec. 155, 4th Div. Comp. Stat. 1887.

This section en. Sec. 491, Pen. C. 1895; re-en. Sec. 8354, Rev. C. 1907; re-en. Sec. 11026, R. C. M. 1921. Cal. Pen. C. Sec. 282.

Voidness of Former Marriage

Under this section voidness of former marriage must have been declared by a court of competent jurisdiction; such a determination of voidness cannot be made under section 48-111 by the person involved to avoid being charged with bigamy under this section and section 94-701.

State v. Crosby, 148 M 307, 420 P 2d 431, 433.

Collateral References

Evidence in prosecution for bigamy of decree of divorce or annulment. 87 ALR 1264.

Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy. 56 ALR 2d 915.

94-703. (11027) Punishment of bigamy. Bigamy is punishable by fine not exceeding two thousand dollars, and by imprisonment in the state prison not exceeding three years.

History: En. Sec. 492, Pen. C. 1895; re-en. Sec. 8355, Rev. C. 1907; re-en. Sec. 11027, R. C. M. 1921. Cal. Pen. C. Sec. 283.

Collateral References

Bigamy€=17. 10 C.J.S. Bigamy § 23. 10 Am. Jur. 2d 1011, Bigamy, § 63.

94-704. (11028) Marrying a husband or wife of another. Every person who knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than two thousand dollars, or by imprisonment in the state prison not exceeding three years.

History: Ap. p. Sec. 127, p. 208, Bannack Stat.; re-en. Sec. 141, p. 302, Cod. Stat. 1871; re-en. Sec. 141, 4th Div. Rev. Stat. 1879; re-en. Sec. 156, 4th Div. Comp. Stat. 1887; en. Sec. 493, Pen. C. 1895;

re-en. Sec. 8356, Rev. C. 1907; re-en. Sec. 11028, R. C. M. 1921. Cal. Pen. C. Sec. 284.

Collateral References

Bigamy . 1. 10 C.J.S. Bigamy §§ 1, 2, 4-6, 8.

94-705. (11029) Incest. Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 128, p. 209, Bannack Stat.; re-en. Sec. 146, p. 303, Cod. Stat. 1871; re-en. Sec. 146, 4th Div. Rev. Stat. 1879; re-en. Sec. 161, 4th Div. Comp. Stat. 1887; amd. Sec. 494, Pen. C. 1895; re-en. Sec. 8357, Rev. C. 1907; re-en. Sec. 11029, R. C. M. 1921. Cal. Pen. C. Sec. 285.

Fornication

A marriage contracted by persons within the degrees of consanguinity prohibited by statute is incestuous, and such persons may be prosecuted under the provisions of this section for the crime of fornication. Territory v. Corbett, 3 M 50.

In a prosecution for fornication, it is not necessary to prove that defendants were not married to other persons. Territory v. Jaspar, 7 M 1, 14 P 647.

Marriage Not Material Element

There was no substantial change in the charge where the court allowed the state to amend an information charging defendant with incest by changing "fornication" to "adultery." Whether the defendant was married or unmarried at the time is not a material ingredient of the offense. In either event the defendant is guilty, if the intercourse charged is proved. State v. Kuntz, 130 M 126, 295 P 2d 707, 710.

Collateral References

Incest@=1, 5. 10 C.J.S. Bigamy §§ 1, 3. 41 Am. Jur. 2d 512 et seq., Incest § 1

Aiding and abetting offense of incest by one not related to parties, 5 ALR 784; 74 ALR 1110 and 131 ALR 1322.

Relationship created by adoption as within statute prohibiting marriage between parties in relationships, or statute regarding incest. 151 ALR 1146.

CHAPTER 8

BRIBERY AND CORRUPTION

Section 94-801. Giving bribes to judges, jurors, referees, etc. 94-802. Receiving bribes by judicial officers, jurors, etc.

94-802. 94-803.

Extortion.

94-804. Improper attempts to influence jurors, referees, etc.

94-805. Misconduct of jurors, referees, etc.

94-806. Embracery.

94-807. 94-808. Misconduct of officers having charge of jury.

94-808. Justice or constable purchasing judgment.
94-809. Convicted officer to forfeit and be disqualified from holding office.

94-810. Bribery of school trustees.

94-811. Offender a competent witness.

94-801. (10853) Giving bribes to judges, jurors, referees, etc. Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, umpire, appraiser, or assessor, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 190, Pen. C. 1895; re-en. Sec. 8209, Rev. C. 1907; re-en. Sec. 10853, R. C. M. 1921, Cal. Pen. C. Sec. 92.

Operation and Effect

The provisions of this section include offers made to members of the jury panel, and do not refer to those members only who have been sworn in a particular case, whose votes it is sought to influence. State ex rel. Webb v. District Court, 37 M 191, 198, 95 P 593.

Collateral References

Bribery€ 1 (1). 11 C.J.S. Bribery §§ 1, 2. 12 Am. Jur. 2d 755, Bribery, § 12.

Contempt by bribing, or attempting to bribe, jurors. 63 ALR 1274, 1280.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Attempt by juror to secure, or acceptance of, bribe as contempt. 125 ALR 1279.

94-802. (10854) Receiving bribes by judicial officers, jurors, etc. Every judicial officer, juror, referee, arbitrator, umpire, appraiser, or assessor, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding upon any matter or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 191, Pen. C. 1895; re-en. Sec. 8210, Rev. C. 1907; re-en. Sec. 10854, R. C. M. 1921. Cal. Pen. C. Sec. 93.

Collateral References

Bribery 1 (2). 11 C.J.S. Bribery §§ 1, 3. 12 Am. Jur. 2d 755, Bribery, § 12.

(10855) **Extortion**. Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a felony.

History: En. Sec. 192, Pen. C. 1895; re-en. Sec. 8211, Rev. C. 1907; re-en. Sec. 10855, R. C. M. 1921. Cal. Pen. C. Sec. 94.

Collateral References

Extortion = 1.

35 C.J.S. Extortion § 1. 31 Am. Jur. 2d 902, Extortion, Blackmail, and Threats, § 3.

- 94-804. (10856) Improper attempts to influence jurors, referees, etc. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause or proceeding, pending or about to be brought before him, either:
- 1. By means of any communication, oral or written, had with him except in the regular course of proceedings;
- 2. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;
 - 3. By means of any threat, intimidation, persuasion, or entreaty; or
- 4. By means of any promise, assurance of any pecuniary or other advantage,

is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 193, Pen. C. 1895; re-en. Sec. 8212, Rev. C. 1907; re-en. Sec. 10856, R. C. M. 1921. Cal. Pen. C. Sec. 95.

Operation and Effect

One who offers a bribe to a juror, with an intent to influence his decision, is guilty of a felony, whether the juror has been actually sworn in a particular case, or is only a member of the panel from which a jury is to be selected. State ex rel. Webb v. District Court, 37 M 191, 198,

Where the evidence discloses that the defendant conversed with a grand juror privately at the latter's home it cannot be construed to be in the regular course of proceedings and thus within the exception to this section. State v. Porter, 125 M 503, 242 P 2d 984, 990.

Collateral References

Embracery == 1. 29A C.J.S. Embracery, §§ 1, 3. 26 Am. Jur. 2d 619-621, Embracery, §§ 1-5.

Coercion by foreman of jury. 97 ALR 1038.

94-805. (10857) Misconduct of jurors, referees, etc. Every juror, or person summoned or drawn as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give any verdict or decision

for or against any party; or,

2. Willfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings,

is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 194, Pen. C. 1895; re-en. Sec. 8213, Rev. C. 1907; re-en. Sec. 10857, R. C. M. 1921. Cal. Pen. C. Sec. 96. Collateral References
Officers©=121.
67 C.J.S. Officers § 133.
47 Am. Jur. 2d 706, Jury, § 95.

94-806. (10858) Embracery. Every person who influences, or attempts to influence, improperly, a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as a juror, or one chosen as an arbitrator, or appointed a referee, in respect to his verdict, judgment, report, award, or decision in any cause or matter pending or about to be brought before him in any case, is punishable as provided in section 94-804.

History: En. Sec. 195, Pen. C. 1895; re-en. Sec. 8214, Rev. C. 1907; re-en. Sec. 10858, R. C. M. 1921.

fendant thought he was influencing a grand juror. State v. Porter, 125 M 503, 242 P 2d 984, 987.

Operation and Effect

After a person has been discharged as a grand juror, the crime of embracery could not be committed even though the de-

Collateral References

Embracery.

29A C.J.S. Embracery, §§ 1, 3.
26 Am. Jur. 2d 619, Embracery, § 1.

94-807. (10859) Misconduct of officers having charge of jury. Every officer to whose charge a jury is committed by a court or judge, who negligently or willfully permits them, or any of them, without leave of the court or judge:

- 1. To receive any communication from any person;
- 2. To make any communication to any person;
- 3. To obtain or receive any book or paper or refreshment; or,
- 4. To leave the jury room,

is guilty of a misdemeanor.

History: En. Sec. 196, Pen. C. 1895; re-en. Sec. 8215, Rev. C. 1907; re-en. Sec. 10859, R. C. M. 1921.

94-808. (10860) Justice or constable purchasing judgment. Every justice of the peace, or constable of the same township, who purchases or is interested in the purchase of any judgment, or part thereof, on the docket of, or on any docket in the possession of, such justice, is guilty of a misdemeanor.

History: En. Sec. 113, p. 205, Bannack Stat.; re-en. Sec. 126, p. 298, Cod. Stat. 1871; re-en. Sec. 126, 4th Div. Rev. Stat. 1879; re-en. Sec. 135, 4th Div. Comp. Stat. 1887; amd. Sec. 197, Pen. C. 1895; re-en. Sec. 8216, Rev. C. 1907; re-en. Sec. 10860, R. C. M. 1921. Cal. Pen. C. Sec. 97.

Collateral References

Justices of the Peace 30; Sheriffs and Constables 153.

51 C.J.S. Justices of the Peace § 23; 80 C.J.S. Sheriffs and Constables § 209.

94-809. (10861) Convicted officer to forfeit and be disqualified from holding office. Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 198, Pen. C. 1895; re-en. Sec. 8217, Rev. C. 1907; re-en. Sec. 10861, R. C. M. 1921. Cal. Pen. C. Sec. 98.

Collateral References
Officers 31.
67 C.J.S. Officers §§ 24, 57.

94-810. (10862) Bribery of school trustees. The offering of any valuable thing to any member of a board of education, school trustee, or other school officer, with the intent thereby to influence his action in regard to the granting of any teacher's certificate, the appointment of any teacher, superintendent, or other officer or employee, the adoption of any textbook, or the making of any contract to which a board of education, school trustees, or other officer is a party, or the acceptance by any member of a board or officer of any valuable thing, with corrupt intent, shall be a felony, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the penitentiary not exceeding one year, or by both such fine and imprisonment; and the person so convicted shall be forever disqualified from holding any office of trust or profit.

History: En. Sec. 199, Pen. C. 1895; re-en. Sec. 8218, Rev. C. 1907; re-en. Sec. 10862, R. C. M. 1921.

Collateral References

Bribery 1 (2).

11 C.J.S. Bribery § 3.

12 Am. Jur. 2d 755 et seq., Bribery § 12 et seq.

Officer's lack of authority as affecting

offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-811, (10863) Offender a competent witness. A person offending against any provision of any section of this code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify on any trial, hearing, proceeding, or investigation in the same manner as any other person; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution.

History: En. Sec. 200, Pen. C. 1895; re-en. Sec. 8219, Rev. C. 1907; re-en. Sec. 10863, R. C. M. 1921.

Collateral References

Criminal Law 22; Witnesses 304.

22 C.J.S. Criminal Law §§ 41, 46; 97 C.J.S. Witnesses §§ 439, 443.
21 Am. Jur. 2d 215 et seq., Criminal Law, § 146 et seq.; 58 Am. Jur. 72 et seq., Witnesses § 84 et seq.

CHAPTER 9

BURGLARY AND HOUSEBREAKING-POSSESSION OF BURGLARIOUS INSTRUMENTS AND DEADLY WEAPONS

Section 94-901. Burglary defined.

Degrees of burglary. 94-902.

94-903. Penalty.

Word "enter" defined. 94-904.

Nighttime defined. 94-905.

94-906. Burglary with explosives.

94-907. Penalty.

Possession of burglarious instruments. 94-908.

Carrying deadly weapon with intent to assault-penalty.

(11346) Burglary defined. Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, motor vehicle and aircraft, vessel, or railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.

History: Ap. p. Sec. 58, p. 188, Bannack Stat.; re-en. Sec. 69, p. 281, Cod. Stat. 1871; re-en. Sec. 69, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 50, L. 1885; re-en. Sec. 73, 4th Div. Comp. Stat. 1887; amd. Sec. 820, Pen. C. 1895; re-en. Sec. 8620, Rev. C. 1907; re-en. Sec. 11346, R. C. M. 1921; amd. Sec. 1, Ch. 126, L. 1949; amd. Sec. 1, Ch. 17, L. 1957. Cal. Pen. C. Sec. 459.

Act of Entry Must Be a Trespass

Under this section the act of entry, to constitute a crime, must be itself a trespass, and the information should therefore negative the idea that the defendant, at the time of entry, had the right to enter. State v. Mish, 36 M 168, 170, 92 P 459. See State v. Rodgers, 40 M 248, 251, 106 P 3.

In order to constitute a burglarious entry within the meaning of this section, the nature of the entry must be itself a trespass, i. e., the invasion of the possession of another. State v. Starkweather, 89 M 381, 385, 297 P 497.

Defendant, convicted of burglary in the nighttime, was operating a barbershop, located in the front part of a pool hall, under a lease; he had a key to the back door leading into the pool hall, in which cigars were kept for sale, through which door he was required to go to gain access to the basement for the purpose, among others, of keeping fire in a heater which provided hot water for the shop. The lessor, suspecting defendant of stealing cigars, wired the back door and discovered him early in the morning climbing through the transom above the door into the pool hall and abstracting two cigars from the case. Held, that under the lease defendant had the unrestricted right to enter the pool hall at any time during the day or night, and the prosecuting witness had no right to wire shut the door; that defendant in gaining entrance into the pool hall as he did, did not invade the possession of the owner, and hence was not guilty of any greater offense than petit larceny. State v. Starkweather, 89 M 381, 297 P 497.

Aiding Another in Entry

To support a conviction of two persons for burglary, it is not essential that the entry shall be by both, but if one of them entered and was aided by the other in so doing both are guilty, since burglary may be committed by being present and aiding another in entering. State v. Harmon, 135 M 227, 340 P 2d 128.

Burglary Tools as Evidence

Burglary tools may be introduced and received into evidence only after proof is made connecting the tools with the accused or the crime and, where it does not appear from the evidence that the tools were ever in the possession or under the control of the defendant or that they were in any way connected with the alleged crime, their admission as evidence is error. State v. Filacchione, 136 M 238, 347 P 2d 1000.

Corpus Delicti May Be Proven by Circumstantial Evidence

The corpus delicti in all criminal prosecutions (except in cases of homicide, section 94-2510), need not be established by direct and positive proof but may be proven by circumstantial evidence, and that in the instant case (burglary) it was so proven, the fact that there was no evidence to show how the entry was made being immaterial. State v. Dixson, 80 M 181, 260 P 138.

Elements of Burglary

The entry of a building with the intent to commit a larceny or some felony is all that, by the statute, is made essential to the crime of burglary. The gravamen of the charge is the entry with this criminal intent. State v. Rogers, 31 M 1, 3, 77 P 293.

In a prosecution for burglary it is not necessary to prove that a larceny was committed, the gravamen of the offense being the entry with intent to commit that or some other crime mentioned in the statute. State v. Ebel, 92 M 413, 416, 15 P 2d 233.

Evidence Showing Sufficient Entry

Evidence in a prosecution for burglary committed by entering a barn by curtain over entryway for the purpose of stealing parts of an automobile, examined and held sufficient to show an entry with intent to commit larceny. State v. Larson, 75 M 274, 277, 243 P 566.

"House" or "Building"

A structure which has walls on all sides and is covered by a roof is a "house" or a "building" within the meaning of this section. State v. Ebel, 92 M 413, 416, 15 P 2d 233.

Held, that a sheepherder's wagon, designed for the purpose of habitation by the herder and the housing of his goods and chattels, being enclosed with four walls and roofed over, meets the above definition of a house or building, the fact

that it was not affixed to the soil, but movable from place to place, being immaterial; hence an information charging unlawful entry of such a wagon was sufficient to state a public offense. State v. Ebel, 92 M 413, 416, 15 P 2d 233.

Ownership of Building-Pleading

While the ownership of the room or building, charged in an information for burglary to have been entered by defendant, need not be specifically alleged, it is the safer practice to do so, if known to the pleader. State v. Mish, 36 M 168, 173, 92 P 459. See State v. Rodgers, 40 M 248, 251, 106 P 3.

Possession of Stolen Property-Remoteness of Time

While mere proof of possession of recently stolen property during the com-mission of a burglary does not raise a presumption of guilt as a matter of law, where it is accompanied by other incriminating circumstances and false or unreasonable explanation, it is sufficient to carry the case to the jury and support conviction; in applying the rule that in-ference of guilt because of possession decreases in proportion to the lapse of time from the taking to its finding, the further rule must be applied that each case must rest largely upon the surrounding circumstances, the matter resting in the discretion of the court. State v. Kinghorn, 109 M 22, 30, 93 P 2d 964.

Proof of Intent-Circumstantial Evidence

An express intention to commit a felony or larceny does not have to be proved, but it may be manifested by circumstances connected with perpetration of the offense without any positive testimony as to express intent. State v. Board, 135 M 139, 337 P 2d 924.

Sufficiency of the Information

In an information charging burglary, the time during the twenty-four hours of the day at which the entry into any of the structures enumerated in this section was made need not be alleged, inasmuch as the degree of the offense, whether committed in the day or nighttime, is to be determined by the jury under proper instructions. State v. Copenhaver, 35 M 342, 344, 89 P 61; State v. Mish, 36 M 168, 175, 92 P 459.

Value of Article Not Essential to Pleadings

Since it is burglary under this section to enter a house or room with intent to commit petit as well as grand larceny, it is unnecessary to allege the value of the articles sought to be stolen in an information charging an attempt to enter a certain room in a lodginghouse with intent to commit larceny. State v. Mish, 36 M 168, 174, 92 P 459. See State v. Rodgers, 40 M 248, 251, 106 P 3.

In a prosecution for burglary, under a charge that defendant feloniously entered the building in question with intent to commit larceny therein, the state was not required to prove the value of the articles taken therefrom; but where the articles taken consisted of gold watches, fountain pens, etc., introduced at the trial as exhibits, the jury must be held to have been sufficiently advised that they had some value. State v. Dixson, 80 M 181, 260 P 138.

Collateral References

Burglary€ 2. 12 C.J.S. Burglary § 1. 13 Am. Jur. 2d 320, Burglary, § 1.

"Outhouse" or "outbuilding," what is, within the meaning of statute as to break-ing and entering. 20 ALR 236. Opening closed but unlocked door as

breaking which will sustain charge of burglary or breaking and entering. 23 ALR 112.

Burglary without breaking. 23 ALR 288. Vacancy or nonoccupancy of building as affecting its character as a "dwelling" as regards burglary. 85 ALR 428.

Construction and application of statute

relating to burglar's tools, 103 ALR 1313, Outbuildings or the like as part of "dwelling house." 43 ALR 2d 831.

Gambling or lottery paraphernalia as subject of burglary. 51 ALR 2d 1396.
Disappearance of property, provisions of burglary or theft policy as to effect of. 12 ALR 3d 865.

DECISIONS UNDER FORMER LAW

Truck

The legislature has made it clear that an automobile and truck are to be considered two distinct and separate vehicles for registration and tax purposes. It does not make sense to hold that the legislature intended, in making entry into an automobile burglary, to have intended

the word "automobile" as a general term, and to include automobiles, trucks, buses and the like. Had the legislature intended to use a general term, it would have used the term "motor vehicle." Certainly no interpretation should be given any word which would make an act a crime unless it is clear that the legislature intended that interpretation should be given such word. State v. Duran, 127 M 233, 259 P 2d 1051, 1052. (See, however, the dissenting opinion, 127 M 233, 259 P 2d 1051, 1054.)

94-902. (11347) Degrees of burglary. Every burglary committed in the nighttime is burglary in the first degree, and every burglary committed in the daytime is burglary in the second degree.

History: En. Sec. 1, p. 50, L. 1885; amd. Sec. 74, 4th Div. Comp. Stat. 1887; amd. Sec. 821, Pen. C. 1895; re-en. Sec. 8621, Rev. C. 1907; re-en. Sec. 11347, R. C. M. 1921. Cal. Pen. C. Sec. 460.

Failure To Allege When Crime Committed

An information charging burglary without stating whether the crime was committed in the day or nighttime held sufficient to sustain conviction of burglary in the first degree. State v. Summers, 107 M 34, 35, 79 P 2d 560.

Conviction of burglary in the first degree is warranted under an information charging burglary without specifying

whether it was committed in the daytime or in the nighttime. State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 221.

Failure To Prove When Crime Was Committed

Where the information alleges nighttime or first degree burglary it is essential that the state prove the crime occurred during the nighttime as provided in section 94-905. When the evidence is that the crime took place sometime between 3:15 a.m. and 8:00 a.m. and that, on the particular day, the sun rose at 5:56 a.m. a conviction of nighttime burglary cannot stand. State v. Fitzpatrick, 125 M 448, 239 P 2d 529, distinguished in 135 M 139, 144, 337 P 2d 924, 927.

Failure To State Degree In Judgment

A judgment is not rendered invalid for failure to state the degree of the crime for which defendant was convicted. State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 221.

Operation and Effect

Where the defendant was specifically charged with burglary in the nighttime, constituting the first degree of the offense of burglary, the jury could not convict him of the crime in its second degree, as having been committed in the daytime. State v. Copenhaver, 35 M 342, 344, 89 P 61.

Collateral References

Law Review

Second Degree Burglary—A Procedural Anomaly, 18 Montana L. Rev. 86 (1956).

94-903. (11348) Penalty. Burglary in the first degree is punishable by imprisonment in the state prison for not less than one nor more than fifteen years. Burglary in the second degree is punishable by imprisonment in the state prison for not more than five years.

History: En. Sec. 2, p. 50, L. 1885; re-en. Sec. 75, 4th Div. Comp. Stat. 1887; amd. Sec. 822, Pen. C. 1895; re-en. Sec. 8622, Rev. C. 1907; re-en. Sec. 11348, R. C. M. 1921. Cal. Pen. C. Sec. 461.

Burglary Is a Felony

The crime of burglary is a felony, under this section and section 94-114, pro-

viding that a felony is a crime which is punishable by imprisonment in the state prison. State v. McGowan, 113 M 591, 594, 131 P 2d 262.

Collateral References

Burglary \$49. 12 C.J.S. Burglary § 68.

94-904. (11349) Word "enter" defined. The word "enter," as used in this chapter, includes the entrance of the offender into such house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, automobile, vessel, or railroad car, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, or used or intended to be used, to threaten or intimidate the inmates, or to detach or remove the property.

History: En. Sec. 823, Pen. C. 1895; re-en. Sec. 8623, Rev. C. 1907; re-en. Sec. 11349, R. C. M. 1921; amd. Sec. 2, Ch. 126, L. 1949.

Compiler's Note.

The amendment of sec. 94-901, by L. 1957, Ch. 17, Sec. 1 substituted "motor vehicle and aircraft" for reference to "automobile" in the definition of burglary.

Entry Through Canvas Curtain

Evidence in a prosecution for burglary

committed by entering a barn the opening to which was guarded by a canvas curtain instead of by a door, for the purpose of stealing parts of an automobile, examined and held sufficient to show an entry with intent to commit larceny. State v. Larson, 75 M 274, 277, 243 P 566.

Collateral References

Burglary \$9 (2). 12 C.J.S. Burglary §§ 7, 10. 13 Am. Jur. 2d 326, Burglary, § 10.

94-905. (11350) Nighttime defined. The phrase "nighttime," as used in this chapter, means the period between sunset and sunrise.

History: En. Sec. 2, p. 50, L. 1885; re-en. Sec. 74, 4th Div. Comp. Stat. 1887; re-en. Sec. 824, Pen. C. 1895; re-en. Sec. 8624, Rev. C. 1907; re-en. Sec. 11350, R. C. M. 1921. Cal. Pen. C. Sec. 463.

Proof as to Time Essential

When an information charges nighttime or first degree burglary, proof that the crime occurred in the period between sunset and sunrise is essential in order to convict the defendant. State v. Fitzpatrick, 125 M 448, 239 P 2d 529, distinguished in 135 M 139, 144, 337 P 2d 924, 927.

Collateral References

94-906. (11351) Burglary with explosives. Any person who enters a building belonging to another with intent to commit a felony or other crime by the use of nitroglycerine, dynamite, gunpowder, or other high explosives, or who commits a burglary by the use of any such explosives, is guilty of burglary with explosives.

History: En. Sec. 1, Ch. 107, L. 1907; Sec. 8625, Rev. C. 1907; re-en. Sec. 11351, R. C. M. 1921.

94-907. (11352) **Penalty.** Burglary with explosives is punishable by imprisonment in state prison for not less than fifteen years, and not more than forty years.

History: En. Sec. 2, Ch. 107, L. 1907; Sec. 8626, Rev. C. 1907; re-en. Sec. 11352, R. C. M. 1921.

94-908. (11353) Possession of burglarious instruments. Every person having upon him or in his possession a picklock, crow, key, bit, or other instrument or tool with intent feloniously to break or enter into any building, or who shall knowingly make or alter or shall attempt to make or alter any key or other instrument above named so that the same will fit or open the lock of a building without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in section 94-901 shall be deemed to be a building within the meaning of this section.

History: Ap. p. Sec. 132, p. 210, Bannack Stat.; re-en. Sec. 149, p. 304, Cod. Stat. 1871; re-en. Sec. 149, 4th Div. Rev. Stat. 1879; re-en. Sec. 174, 4th Div. Comp.

Stat. 1887; en. Sec. 830, Pen. C. 1895; re-en. Sec. 8627, Rev. C. 1907; re-en. Sec. 11353, R. C. M. 1921. Cal. Pen. C. Sec. 466.

Collateral References

Burglary \$\infty\$12.

12 C.J.S. Burglary § 69. 13 Am. Jur. 2d 366 et seq., Burglary, § 74 et seq.

Construction and application of statute relating to burglars' tools. 103 ALR 1313.

94-909. (11354) Carrying deadly weapon with intent to assault—penalty. Every person having upon him a deadly weapon with intent to assault another is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term of not less than one year nor more than five years.

History: En. Sec. 831, Pen. C. 1895; re-en. Sec. 8628, Rev. C. 1907; amd. Sec. 1, Ch. 79, L. 1919; re-en. Sec. 11354, R. C. M. 1921. Cal. Pen. C. Sec. 467.

Proof of Specific Purpose

To constitute the crime of carrying a deadly weapon with intent to commit an assault, evidence that an assault was committed is not alone sufficient, but it devolves upon the state to prove beyond a reasonable doubt that defendant armed himself for the specific purpose of committing the assault, and it is not permissible to infer such intent from the bare fact that he bore a weapon at the time of the assault. State v. Hodge, 84 M 24, 27, 273 P 1049.

Conviction of defendant who, on observing another driving a herd of cattle toward his range, intercepted them on a public road and, flourishing his revolver over his head, threatened violence if they were driven farther, was unwarranted in the absence of proof that he had armed himself for the specific purpose of committing the assault. State v. Hodge, 84 M 24, 27, 273 P 1049.

Collateral References

Weapons \$\sim 7.

94 C.J.S. Weapons § 5 et seq.

56 Am. Jur. 995 et seq., Weapons and Firearms, § 9 et seq.

CHAPTER 10

COMMON NUISANCES—MAINTENANCE IN CONNECTION WITH SELLING INTOXICATING LIQUORS-OPIUM-PROSTITUTION AND GAMBLING

Section 94-1001. Definition of "person" and "building."

94-1002. Certain buildings declared nuisances. 94-1003. County attorney to abate nuisance—when warrant may issue.

94-1004. Verification of complaint—temporary injunction. 94-1005. Precedence of actions—dismissal—costs.

Violation of injunction-punishment. 94-1006.

94-1007. Order of abatement—sale of fixtures—closing of buildings—fees service.

94-1008. Proceeds of sale, how applied.

94-1009. Owner may give bond—terms of bond—release of property. 94-1010. Fine a lien on building.

94-1011. Repealing clause.

94-1001. (11123) Definition of "person" and "building." The term "person" as used in this act shall be deemed and held to mean and include individuals, corporations, associations, partnerships, trustees, lessees, agents, and assignees. The term "building" as used in this act shall be deemed and held to mean and include so much of any building or structure of any kind as is or may be entered through the same outside entrance.

History: En. Sec. 1, Ch. 95, L. 1917; re-en. Sec. 11123, R. C. M. 1921.

Effect of Statute

While the prior definition of a nuisance is enlarged, no new remedy is created, and the effect of this law is not to supplant the attorney general as a proper party who

may invoke the remedy on behalf of the state, but to extend the law by conferring upon a private citizen the right, and upon the county attorney the duty, to suppress the nuisances defined. State ex rel. Ford v. Young, 54 M 401, 404, 170 P 947.

Actions for the prosecution of gambling laws may be prosecuted under either of these sections or under sections 94-2401 and 94-2404, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

Fact that county attorney proceeded under this law for abatement of gambling nuisance, rather than under sections 94-2401 and 94-2404 for criminal punishment, is not a matter of which the defendant can complain on appeal. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

Collateral References

Disorderly Houses 3, 9; Intoxicating Liquors 143, 167; Nuisance 69.

27 C.J.S. Disorderly Houses §§ 3, 9; 48 C.J.S. Intoxicating Liquors §§ 226-228, 269, 275, 276, 278, 280-283; 66 C.J.S. Nuisances

24 Am. Jur. 2d 81 et seq., Disorderly Houses, § 1 et seq.; 39 Am. Jur. 449-451, Nuisances, §§ 178, 180.

94-1002. (11124) Certain buildings declared nuisances. Every building or place or tract of land under one ownership used for the purpose of lewdness, assignation, or prostitution, and every building or place or tract of land under one ownership wherein or upon which acts of lewdness, assignation, or prostitution are held or occur, and any building, place or tract of land under one ownership wherein or upon which gambling or those other illegal acts prohibited by chapter 24 and chapter 30, Title 94 Revised Codes of Montana, 1947, are carried on or occurs, contrary to any of the laws of the state of Montana, or wherein any wine rooms are conducted or maintained, contrary to the laws of the state of Montana, or wherein any opium or coca leaves, their salts, derivatives, and preparations thereof are sold or given away or used contrary to the laws of the state of Montana, is a nuisance which shall be enjoined, abated, and prevented as hereinafter provided, whether the same be a public or private nuisance.

History: En. Sec. 2, Ch. 95, L. 1917; amd. Sec. 1, Ch. 76, L. 1921; re-en. Sec. 11124, R. C. M. 1921; amd. Sec. 1, Ch. 268, L. 1959.

Cross-References

Maintaining gambling apparatus, sec.

Unlawful sales of liquor, sec. 4-239.

Abatement

Since "abatement" of a common nuisance calls for the doing away of the nuisance, and to enjoin or suppress it is tantamount to abatement, the fact that a judgment in such a proceeding merely ordered that hereafter the keeping of liquor and the conducting of gambling games be prohibited therein and the building closed for one year, did not render it insufficient on the alleged ground that it contained no provision ordering the nuisance abated. State ex rel. Lamey v. Young, 72 M 408, 416, 234 P 248.

"Bank Night" Drawings at Theaters

In an action to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the

defendant corporation in the theater buildings, and not from the sale of admission tickets to the theater," held, on the facts presented, that the scheme did not constitute a lottery; State ex rel. Dussault v. Fox Missoula Theatre Corporation, 110 M 441, 101 P 2d 1065 overruled; second part of section 2, article XIX of constitution is not self-executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 57, 70, 132 P 2d 689.

Held, on the authority of State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 132 P 2d 689, that in the absence of a showing that the winner of a prize offered by a theater on "bank night" had paid a valuable consideration for the chance to win, the finding of the court that the scheme constituted a lottery under section 94-3001 and as such a nuisance under this section, was error. State ex rel. Smith v. Fox Missoula Theatre Corporation, 114 M 102, 103, 132 P 2d 711.

Fraternal Organization (Abatement and Quo Warranto Proceedings Distinguished)

In an action to abate a gambling nuisance conducted in the club rooms of a fraternal organization wherein exemption was claimed from the operation of the gambling laws under section 94-2403, evidence held sufficient to justify the finding that the entire scheme of operations was a mere subterfuge, and that the gambling was not limited to nor for the amusement of bona fide members, but was operated as a business; the question in abatement being whether a duly organized fraternal organization is permitting practices in its club rooms in violation of the gambling laws as distinguished from a quo warranto attack upon corporate status. State ex rel. Bottomly v. Johnson, 116 M 483, 485, 154 P 2d 262.

Illegal Use of Premises by Vendee

Where vendee-madam sought to void mortgage given vendor-madam on property used exclusively for prostitution, on the grounds that vendor-madam knew the property was to be used in violation of the laws and public policy of Montana, bare knowledge of the illegal purpose was not sufficient to void the contract in the absence of more active participation on the part of the seller. Carroll v. Beardon, 142 M 40, 381 P 2d 295.

Law Applicable

Procedure for abatement of a nuisance per se is that set forth by this law, and general procedure for issuance of injunction in ordinary civil cases has no application. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

Order Quashing Injunction Appealable

Where temporary injunction enjoining defendant from conducting business constituting a nuisance was quashed same day of issuance and an order issued enjoining defendant from operating "any of the games of chance described in the complaint contrary to the laws of the State of Montana," such order was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

Permanent Injunction during Hearing

A permanent injunction against the use of defendant's premises as a house of prostitution and an order of abatement cannot be granted pursuant to this section while a motion to strike is pending and before issues have been finally joined. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

Punch Boards

Premises wherein punch boards are operated may be abated as a nuisance inasmuch as punch boards constitute a lottery and play at lottery is gambling. Sections 84-5701, 84-5702 (since repealed) and 94-2401 which assume to authorize the use of punch boards as trade stimulators violate section 2, article XIX of the Montana constitution, which prohibits the legislature from authorizing lotteries, and therefore are invalid and do not prevent

the abatement of the premises as a nuisance. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

Quashing Injunction Prior to Hearing

Where complaint and affidavits showed prima facie that premises constituted a nuisance per se, it was error to quash temporary injunction issued thereunder when defendant filed affidavit under provisions of section 93-4211; injunction should have remained in effect until a hearing was had. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

Reaches All Forms of Gambling

This section is intended to reach all forms of gambling, including lotteries which are prohibited by sections 94-3001 et seq. as well as the many forms of gambling enumerated by sections 94-2401 et seq. State ex rel. Leahy v. O'Rourke, 115 M 502, 504, 146 P 2d 168.

Verified Complaint

Complaint filed by one other than county attorney, if verified on information and belief pursuant to section 93-3702, is sufficient for issuance of temporary injunction. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

Collateral References

Disorderly Houses 1 et seq.; Intoxi-

27 C.J.S. Disorderly Houses § 1 et seq.; 48 C.J.S. Intoxicating Liquors §§ 405, 408; 66 C.J.S. Nuisances §§ 45, 48.
24 Am. Jur. 2d 81 et seq., Disorderly Houses § 1 et seq.; 38 Am. Jur. 2d 119, Cambling § 16

Gambling, § 16.

Disorderly character of house as affected by the number of females who reside therein or resort thereto for immoral purposes. 12 ALR 529.

Right to jury trial in case of seizure of property alleged to be illegally used. 17 ALR 568 and 50 ALR 97

Entrapment to commit crime of procuring women for immoral purposes, with view to prosecution therefor. 18 ALR 186; 66 ALR 478 and 86 ALR 263.

Power to declare pool and billiard room and bowling alleys a nuisance per se, and right to enjoin their operation. 20 ALR 1496; 29 ALR 41; 53 ALR 149 and 72 ALR 1339.

Keeping house of ill fame as "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1011.

Amusement park as a nuisance. 33 ALR 725.

Slot vending machines as gambling devices. 38 ALR 73; 81 ALR 177.

Constitutionality of statute forbidding or regulating dissemination of betting odds or other gambling information. 47 ALR 1135.

Constitutionality of statute enacted to prevent prostitution, and providing that upon the trial of one accused of violating its provisions, the acceptance of money from the earnings of a prostitute shall be prima facie evidence of lack of consideration. 51 ALR 1156; 86 ALR 179 and 162

Constitutionality, construction and application of statute exempting schemes for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against lotteries or gambling. 103 ALR 875.

Construction and application of statute permitting specified form of betting, 117

Slot machine within prohibitory statute or ordinance as limited to gambling device. 132 ALR 1004.

Failure of police officer to suppress bawdyhouse as conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense. 134 ALR 1250.

What are games of chance, games of skill, and mixed games of chance and skill. 135 ALR 104.

94-1003. (11125) County attorney to abate nuisance—when warrant may issue. Whenever there is a reason to believe that such nuisance is kept, maintained, or exists in any county of the state of Montana, the county attorney must, or any citizen of the county may, maintain an action in equity in the name of the state of Montana upon the relation of such county attorney or citizen as the case may be to abate and prevent such nuisance and to perpetually enjoin the person or persons conducting or maintaining the same, and the owner, lessee, or agent of the building, or place, in or upon which such nuisance exists, from directly or indirectly maintaining or permitting such nuisance.

No warrant shall be issued against the owner of a private dwelling occupied as such, unless some part of it is used as a store or shop, hotel or boardinghouse, or for any other purpose than a private residence, or unless such residence is a place of public resort.

History: En. Sec. 3, Ch. 95, L. 1917; re-en. Sec. 11125, R. C. M. 1921.

Any Citizen of County May Bring Abatement Action

Under this section, the county attorney must, but any citizen may, bring an action in equity to abate a gambling nuisance; hence where the complainant was a citizen the court acquired jurisdiction of the cause; and while there may be ground for criticism of an attorney who acted as complainant, prosecutor and witness, all for a compensation of \$250, where there was no evidence controverting any of the facts brought out by the prosecution, there appears no reason why the supreme court should question the motive of com-plainant or the credibility of his testimony. State ex rel. Leahy v. O'Rourke, 115 M 502, 508, 146 P 2d 168.

Procedural Rules Applicable

A suit under the provisions of this section is a civil suit, and is governed by the same rules applicable in other injunction suits where no other statutory direction is given as to the manner in which the court shall proceed. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

Collateral References

Intoxicating Liquors 264; Nuisance

48 C.J.S. Intoxicating Liquors §§ 405, 408; 66 C.J.S. Nuisances § 77. 39 Am. Jur. 455 et seq., Nuisances,

§ 184 et seq.

94-1004. (11126) Verification of complaint—temporary injunction. The complaint in such action must be verified unless filed by the county attorney. Whenever the existence of such nuisance is shown in such action to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

History: En. Sec. 4, Ch. 95, L. 1917; re-en. Sec. 11126, R. C. M. 1921.

Law Applicable

The procedure for the abatement of a nuisance per se provided by the statute is that set forth by this law, and the general procedure for the issuance of an injunction in ordinary civil cases has no application. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

Order Quashing Injunction Appealable

Where temporary injunction enjoining defendant from conducting the business constituting a nuisance as described in the complaint was quashed same day of issuance and an order issued enjoining defendant from operating "any of the games of chance described in the complaint contrary to the laws of the State of Montana," such order was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

Quashing Injunction Prior to Hearing

Where complaint and affidavits showed prima facie that premises constituted a

nuisance per se, it was error to quash the temporary injunction issued thereunder when defendant filed affidavit under provisions of section 93-4211, but injunction should have remained in effect until a hearing was had. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307, 309.

Verified Complaint

A complaint filed by a person other than the county attorney, if verified on information and belief pursuant to section 93-702, is sufficient for the issuance of a temporary injunction. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

Collateral References

Intoxicating Liquors \$\iiii 273, 274; Nuisance \$\iiiii 84.

48 C.J.S. Intoxicating Liquors §§ 418, 419; 66 C.J.S. Nuisances § 77.

39 Am. Jur., Nuisances, p. 410, § 147; pp. 452, 453, § 181.

Right to enjoin threatened or anticipated nuisance. 7 ALR 749; 26 ALR 937; 32 ALR 724 and 55 ALR 880.

94-1005. (11127) Precedence of actions—dismissal—costs. The action when brought shall have precedence over all other actions, excepting criminal proceedings, election contests, and hearings on injunction, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed by the plaintiff or for want of prosecution except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with the reasonable diligence, or at the request of the plaintiff, the court, in its discretion, may substitute any such citizen consenting thereto for such plaintiff. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs shall be taxed against such citizen.

History: En. Sec. 5, Ch. 95, L. 1917; re-en. Sec. 11127, R. C. M. 1921.

48 C.J.S. Intoxicating Liquors §§ 416, 420, 421, 428; 66 C.J.S. Nuisances § 77 et seq.; 88 C.J.S. Trial §§ 31-35.

Collateral References

Intoxicating Liquors 271, 275, 276, 281; Nuisance 84, 88; Trial 13 (1).

94-1006. (11128) Violation of injunction—punishment. Any violation or disobedience of either any injunction or order expressly provided for by this act shall be punished as a contempt of court by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 6, Ch. 95, L. 1917; re-en. Sec. 11128, R. C. M. 1921.

Collateral References

Intoxicating Liquors \$\infty 279; Nuisance \$\infty 86.

48 C.J.S. Intoxicating Liquors §§ 425, 426; 66 C.J.S. Nuisances § 135.

94-1007. (11129) Order of abatement—sale of fixtures—closing of buildings-fees-service. If the existence of the nuisance be established in an action as provided herein, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments, gambling paraphernalia, and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year; unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building or place shall be and remain in the custody of the court. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed, a reasonable sum shall be allowed by the court; provided, however, that any such fixtures, musical instruments, goods, wares, or merchandise, or other movable property, which has not been the active means of conducting such nuisance, shall, at any time prior to the sale thereof by the sheriff as above provided, be subject to attachment or execution at the instance of a bona fide creditor of the owner thereof, and may be subjected to bankruptcy or insolvency proceedings, the same as if such order of abatement had not been entered. When any such writ of attachment, execution, or other process is placed in the sheriff's hands for service upon any such property, his possession thereof under the order of abatement shall thereupon be deemed to be possession under such writ or process and equivalent to levy, attachment, and seizure thereof.

History: En. Sec. 7, Ch. 95, L. 1917; amd. Sec. 1, Ch. 59, L. 1919; re-en. Sec. 11129, R. C. M. 1921.

Where Evidence Supplies Description Not Specified in Complaint

Where the complaint in an abatement proceeding relative to a gambling nuisance failed to specify particularly the articles constituting the equipment sought to be confiscated and sold by the sheriff as provided in this section, and the judgment was defective in that respect, but the evidence admitted at the trial without objection sufficiently described the various articles used, it corrected the omission from the complaint sufficiently to enable the court to amend the judgment in that behalf; herein the trial court was ordered

to so amend the judgment. State ex rel. Bottomly v. Johnson, 116 M 483, 489, 154 P 2d 262.

Collateral References

Nuisance \$\iint_85.
66 C.J.S. Nuisances § 77.

Constitutionality of statutes conferring on chancery courts power to abate public nuisances. 5 ALR 1474; 22 ALR 542 and 75 ALR 1298.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor. 12 ALR 431; 121 ALR 642.

94-1008. (11130) Proceeds of sale, how applied. The proceeds of the sale of the property, as provided in the preceding section, shall be applied as follows:

- 1. To the fees and costs of such removal and sale.
- 2. To the allowance and costs of so closing and keeping closed such building or place.
 - 3. To the payment of the plaintiff's costs in such action.
- 4. The balance, if any, shall be paid into the common school fund of the school district in which the said property was seized.

If the proceeds of such sale do not fully discharge all such costs, fees, and allowances, the said building and place shall then also be sold under execution issued upon the order of the court or judge and the proceeds of such sale applied in like manner.

History: En. Sec. 8, Ch. 95, L. 1917; re-en. Sec. 11130, R. C. M. 1921.

94-1009. (11131) Owner may give bond — terms of bond — release of property. If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises closed, under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

History: En. Sec. 9, Ch. 95, L. 1917; re-en. Sec. 11131, R. C. M. 1921.

Operation and Effect

This section did not give authority to court to order the return of the property to the owners where sheriff in executing judgment made return of no gambling equipment found notwithstanding that defendants had stipulated that gambling equipment was in their possession. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1033.

94-1010. (11132) Fine a lien on building. Whenever the owner of a building or place upon which the act or acts constituting the contempt shall have been committed, or of any interest therein has been guilty of a contempt of court and fined therefor in any proceedings under this act, such fine shall be a lien upon such building and place to the extent of the interest of such person therein enforceable and collectible by execution issued by the order of the court.

History: En. Sec. 10, Ch. 95, L. 1917; re-en. Sec. 11132, R. C. M. 1921.

94-1011. (11133) Repealing clause. All acts and parts of acts in conflict with the provisions of this act are hereby repealed; provided, that nothing herein shall be construed as repealing any laws of the state of Montana for the suppression of lewdness, assignation, and prostitution, or for the suppression and prevention of gambling, or the suppression and regulation of wine rooms.

History: En. Sec. 11, Ch. 95, L. 1917; re-en. Sec. 11133, R. C. M. 1921.

Collateral References

Intoxicating Liquors 259; Nuisance

48 C.J.S. Intoxicating Liquors §§ 405, 406; 66 C.J.S. Nuisances §§ 45, 48.

CHAPTER 11

CRIMINAL CONSPIRACY AND ILLEGAL PRACTICES IN RESTRAINT OF TRADE—TRUSTS—DISCRIMINATIONS—POOLING GRAIN WAREHOUSES-DESTROYING FOOD

Section 94-1101. Criminal conspiracy defined and punishment fixed.

94-1102. No other conspiracies punishable criminally.

94-1103. Overt act, when necessary.

94-1104. Unlawful trusts and monopolies—penalty.

94-1105. Certain agreements between laborers excepted.

Persons not to be excused from testifying. 94-1106.

94-1107. Unfair discrimination in purchase price of commodities.

94-1108. Prosecutions by attorney general. 94-1109. Penalty for violation of law.

94-1110. Act is cumulative.

What constitutes unfair competition or discrimination in sale of com-94-1111. modities.

Prosecutions by attorney general. 94-1112.

94-1113. Penalty for violation of law.

94-1114. Act is cumulative.

94-1115. Pooling in purchase, sale or handling of grain by warehousemen.

94-1116. Penalty for violation of law-notice to grain inspector.

94-1117. Destruction of food in restraint of trade.

94-1118. Penalty for violation of act.

94-1101. (10898) Criminal conspiracy defined and punishment fixed. If two or more persons conspire:

To commit any crime;

- Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;
 - 3. Falsely to move or maintain any suit, action, or proceeding;
- To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses: or.
- To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws.

they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 109, p. 204, Bannack Stat.; re-en. Sec. 123, p. 297, Cod. Stat. 1871; re-en. Sec. 123, 4th Div. Rev. Stat. 1879; re-en. Sec. 132, 4th Div. Comp. Stat. 1887; amd. Sec. 320, Pen. C. 1895; re-en. Sec. 8284, Rev. C. 1907; re-en. Sec. 10898, R. C. M. 1921. Cal. Pen. C. Sec. 182.

Liability of Coconspirator

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. State v. Alton, 139 M 479, 365 P 2d 527, 535.

Means By Which Accomplished Must Be Alleged

An indictment for a conspiracy to cheat and defraud a county must allege the means by which the conspiracy was to be accomplished. An allegation that the defendants conspired "to cheat and defraud" is not sufficient. Territory v. Carland, 6 M 14, 15, 9 P 578.

Operation and Effect

Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, the assignor had made explorations along the vein, and had con-cluded that an adjoining mine owner was trespassing on a vein having its apex within the boundaries of the mine leased and assigned, either the assignor or the assignee might have prosecuted such alleged trespass. The fact that the assignment required the assignor to prosecute such action for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render the contract void as a conspiracy under this section. Finlen v. Heinze, 28 M 548, 567, 73 P 123.

Collateral References

Conspiracy 28, 30, 34.

15A C.J.S. Conspiracy §§ 47, 54, 59,

16 Am. Jur. 2d 129 et seq., Conspiracy §1 et seq.

Wife's criminal responsibility for conspiracy with husband. 4 ALR 282 and 71 ALR 1116.

Incapacity to commit offense affecting responsibility for conspiracy to commit it. 5 ALR 787; 74 ALR 1114 and 131 ALR 1327.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it. 11 ALR 196 and 104 ALR 1430.

Entrapment to commit conspiracy. 18 ALR 158; 66 ALR 487 and 86 ALR 266.

"Infamous offense" conspiracy as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1008.

Substitution or attempted substitution of another for one under sentence as a criminal offense. 28 ALR 1381.

Prosecution of conviction of one party

to alleged conspiracy, as affected by disposition of case against other parties. 72 ALR 1180 and 91 ALR 2d 700.

Merger of conspiracy in completed offense. 75 ALR 1411.

Woman who connives or consents to own transportation for immoral purposes as coconspirator. 84 ALR 376.

Taking of usury or excessive interest as subject of criminal conspiracy. 89 ALR

830.

Criminal liability for market manipulation of securities. 115 ALR 274.

Bill of particulars to one accused of conspiracy to overthrow government. 5 ALR 2d 496.

Criminal conspiracy between spouses. 46 ALR 2d 1275.

Availability of defense of entrapment where one accused of conspiracy denies participation in offense. 61 ALR 2d 677.

Statements of coconspirators made after termination of conspiracy and outside accused's presence, admissibility of. 4 ALR

Conspirator who was not in state at time of substantive criminal act, jurisdiction to prosecute for offense committed pursuant to conspiracy. 5 ALR 3d 887.

(10899) No other conspiracies punishable criminally. No conspiracies other than those enumerated in the preceding section are punishable criminally.

History: En. Sec. 322, Pen. C. 1895; re-en. Sec. 8286, Rev. C. 1907; re-en. Sec. 10899, R. C. M. 1921. Cal. Pen. C. Sec. 183.

Collateral References

Conspiracy 23. 15A C.J.S. Conspiracy § 79 et seq.

94-1103. (10900) Overt act, when necessary. No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act, besides such agreement, be done to effect the object thereof, by one or more of the parties to the agreement.

History: En. Sec. 323, Pen. C. 1895; re-en. Sec. 8287, Rev. C. 1907; re-en. Sec. 10900, R. C. M. 1921. Cal. Pen. C. Sec. 184.

Collateral References

Conspiracy 27. 15A C.J.S. Conspiracy § 5. 16 Am. Jur. 2d 133, Conspiracy § 11.

(10901) Unlawful trusts and monopolies — penalty. Every person, corporation, stock company, or association of persons in this state, who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation, or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce—the phrase "articles of commerce," as herein employed, shall and does include not only those articles which are generally, popularly, and legally known as articles of commerce, but also gas, water, water power, electric light, and electric power, for whatever purpose used or employed—or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce, or product, intended for sale, use, or consumption, will be in any way controlled, or to agree, directly or indirectly, to add to a bid for any contract an amount, fixed by percentage or otherwise, for the purpose of making a refund or sharing costs of bidding with any other bidder, or to return a part of any amount added to a bid by collusive agreement among bidders to any person, association, organization or corporation, or to create a monopoly in the manufacture, sale, or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such articles below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the county jail for a period not less than twenty-four (24) hours or more than one (1) year, or by fine not exceeding twenty-five thousand dollars (\$25,000), or both.

History: En. Sec. 1, Ch. 97, L. 1909; re-en. Sec. 10901, R. C. M. 1921; amd. Sec. 1, Ch. 102, L. 1967.

Cross-References

Contracts in restraint of trade void, sec. 13-807.

Monopolies, sees. 51-101 to 51-206.

Monopolies in sale of schoolbooks, sec. 75-3506.

Monopoly statutes apply to producers of dairy products, sec. 3-2458.

Motor vehicles, monopolies in financing sales. secs. 51-201 to 51-206.

Insurance Business

Since this section prohibits conspiracies in restraint of trade in the insurance business, federal district court, because of the provisions of the McCarran Act (15 U. S. C. § 1 et seq.), would have no jurisdiction of a suit for violation of the Sherman and Clayton Acts involving the business of insurance, unless the suit fell within an exception to the McCarran Act. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 280.

Monopolies

Plaintiffs in an action seeking the forfeiture of an oil and gas lease, on the ground, among others, that the lessee failed to fulfill the provision of the lease making it its duty to market the gas found, could properly urge that a contract entered into by the lessee with a natural gas company under which the former bound itself not to sell gas to others within a certain market, was invalid as creating a monopoly contrary to the provisions of section 20, article XV of the constitution, and section 13-807 and this section. Stranahan v. Independent Natural Gas Co., 98 M 597, 609, 41 P 2d 39.

Pricing Agreements

A lease of a service station owned by an oil company under which the lessee bound himself to maintain the price established by the lessor at the various service stations owned by it in the same city, held not void as in violation of this section, prohibiting unlawful trusts and monopolies. Quinlivan v. Brown Oil Co., 96 M 147, 151, 29 P 2d 374.

A contract fixing the price of an article of commerce in a community does not offend against the provisions of this section, if it is reasonable and does not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce. Quinlivan

v. Brown Oil Co., 96 M 147, 151, 29 P 2d 374.

Collateral References

Monopolies €== 29.

58 C.J.S. Monopolies §§ 27, 113.

36 Am. Jur. 482-496, Monopolies, Combinations, and Restraints of Trade, §§ 5-15.

Legality of combinations or agreements between insurance companies or insurance agents. 21 ALR 543.

"Open competition plan," "gentleman's agreement," and the like, as violation of antitrust acts. 21 ALR 1109.

Monopoly in dramatics and motion pictures. 26 ALR 369.

The boycott as a weapon in industrial

disputes. 27 ALR 651; 32 ALR 779 and 116 ALR 484.

Laundry business as within statute relating to monopolies. 31 ALR 533.

Validity of agreement of stockholders not to engage in business in which corporation is engaged. 63 ALR 316.

Collective labor agreement as in restraint of trade or violating antitrust laws. 95 ALR 25.

Statutes providing for sale of intoxicating liquor by estate or state agencies as creating monopolies. 121 ALR 303.

Judicial decisions involving ASCAP. 136 ALR 1483.

Participation in illegal combination as defense to action under antitrust act. 160 ALR 381.

94-1105. (10902) Certain agreements between laborers excepted. The provisions of this act do not apply to any arrangements, agreement, or combination between laborers, made with the object of lessening the number of hours of labor or increasing wages.

History: En. Sec. 2, Ch. 97, L. 1909; re-en. Sec. 10902, R. C. M. 1921.

Collateral References
Monopolies 29.
58 C.J.S. Monopolies § 79 et seq.

94-1106. (10903) Persons not to be excused from testifying. No person shall be excused from testifying in any prosecution brought pursuant to the provisions of this act, but no person testifying for the prosecution shall be punished or prosecuted in any manner whatsoever for any act committed by him personally, as to which he is called upon to testify in a prosecution against any person or corporation, stock company, or association.

History: En. Sec. 3, Ch. 97, L. 1909; re-en. Sec. 10903, R. C. M. 1921.

Collateral References

Criminal Law 42; Witnesses 292.

22 C.J.S. Criminal Law §§ 41, 46; 98 C.J.S. Witnesses §§ 431, 457.

21 Am. Jur. 2d 215 et seq., Criminal Law, § 146 et seq.; 58 Am. Jur. 72 et seq., Witnesses, § 84 et seq.

94-1107. (10904) Unfair discrimination in purchase price of commodities. Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the state of Montana, and engaged in the business of buying, selling, producing, manufacturing, or distributing any commodity or product in general use, that shall, for the purpose of creating a monopoly or destroying the business of a regularly established dealer in such commodity or product, or to prevent the competition of any person, firm, company, association, or corporation who in good faith intends or attempts to become such dealer, shall discriminate between different persons, sections, communities, or portion thereof, or parts of the state of Montana, by purchasing any commodity or product in general use at a higher rate or price in one section, city, or community, or any portion thereof, than such person, firm, company, association, or corporation pays for such commodity or product in another section, city, or community, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale,

storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful.

Proof that any person, firm, company, association, or corporation has paid a higher rate or price for any such commodity or product in one section, city, or community, or any portion thereof, than such person, firm, company, association or corporation paid for such commodity or product in another section, city or community, or portion thereof, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be prima facie evidence of the violation of this act; provided, however, that the payment of such higher rate or price in one section, city or community, or any portion thereof, that each person, firm, company, association or corporation pays for such commodity or product in another section, city or community, after making such allowance as above provided, shall not be deemed to be unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such section, city or community, but the burden of proof of such fact shall be upon the person, firm, company, association or corporation charged with unfair discrimination.

History: En. Sec. 1, Ch. 8, L. 1913; amd. Sec. 1, Ch. 80, L. 1917; re-en. Sec. 10904, R. C. M. 1921; amd. Sec. 1, Ch. 131, L. 1925.

Cross-Reference

Unfair Practices Act, secs. 51-101 to 51-118.

Intent To Stifle Competition Must Be Shown

This section seeks to define and provide punishment for unfair discrimination in buying and not in selling, and before a conviction can be sustained, it must be made to appear that the discriminatory rate was paid intentionally for the purpose of stifling competition, and not merely that a higher price was paid. State v. Rocky Mountain Elevator Co., 52 M 487, 491, 158 P 818.

Collateral References

Monopolies 17 (1.7) et seq. 58 C.J.S. Monopolies § 58. 36 Am. Jur. 512, Monopolies, Combinations, and Restraints of Trade, § 28.

Actual competition as necessary element of trade-mark infringement or unfair competition, 148 ALR 12,

competition. 148 ALR 12.

Conflict of laws, with respect to trademark infringement or unfair competition including the area of conflict between federal and state law. 148 ALR 139.

94-1108. (10905) Prosecutions by attorney general. If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state; and if, in such action, the court shall find that such corporation is guilty of unfair discrimination, as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

History: En. Sec. 2, Ch. 8, L. 1913; amd. Sec. 2, Ch. 80, L. 1917; re-en. Sec. 10905, R. C. M. 1921.

Collateral References
Corporations©=599, 613 (1).
19 C.J.S. Corporations §§ 1665, 1699.
36 Am. Jur. 673, Monopolies, Combinations, and Restraints of Trade, § 222.

94-1109. (10906) Penalty for violation of law. Any person, firm, or corporation violating the provisions of section 94-1107, whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. Sec. 3, Ch. 8, L. 1913; amd. Sec. 3, Ch. 80, L. 1917; re-en. Sec. 10906, R. C. M. 1921.

94-1110. (10907) Act is cumulative. Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

History: En. Sec. 4, Ch. 80, L. 1917; re-en. Sec. 10907, R. C. M. 1921.

94-1111. (10908) What constitutes unfair competition or discrimination in sale of commodities. Any person, firm, or corporation, foreign or domestic, doing business in the state of Montana, and engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regularly established dealer in such commodity, or to prevent the competition of any person, firm, or corporation who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or parts of this state, by selling such commodity at a lower rate or price in one section, city, or community, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such commodity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution, and freight rates therefrom, shall be deemed guilty of unfair discrimination.

History: En. Sec. 1, Ch. 7, L. 1913; re-en. Sec. 10908, R. C. M. 1921.

94-1112. (10909) Prosecutions by attorney general. If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if, in such action, the court shall find that such corporation is guilty of unfair discrimination as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

History: En. Sec. 2, Ch. 7, L. 1913; re-en. Sec. 10909, R. C. M. 1921.

94-1113. (10910) Penalty for violation of law. Any person, firm, or corporation violating the provisions of section 94-1111, whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. Sec. 3, Ch. 7, L. 1913; re-en. Sec. 10910, R. C. M. 1921.

94-1114. (10911) Act is cumulative. Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

History: En. Sec. 4, Ch. 7, L. 1913; re-en. Sec. 10911, R. C. M. 1921.

94-1115. (10912) Pooling in purchase, sale or handling of grain by warehousemen. It shall be unlawful for any person, firm, or corporation engaged in the buying, selling, or handling of grain in any public local warehouse in this state, or for the local agent in charge of such warehouse, or any other agent of the person, firm, or corporation operating the same, to enter into any contract, agreement, combination, or understanding with any other person, firm, or corporation, owning or operating any other public local warehouse at any railway station, its agent or agents, whereby the amount of grain to be received or handled by said warehouses at such station or stations shall be equalized or pooled between said warehouses, or whereby the profits or earnings derived from said warehouses shall be divided or pooled or apportioned in any manner, or whereby the price to be paid for any kind of grain, at such station, shall be fixed or in any manner affected; and each day of the continuance of any such agreement, contract, or understanding shall constitute a separate offense.

History: En. Sec. 1, Ch. 69, L. 1915; re-en. Sec. 10912, R. C. M. 1921.

94-1116. (10913) Penalty for violation of law—notice to grain inspector. Any person, firm, or corporation, or any agent of any person, firm, or corporation, who shall violate the provisions of this act, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars or more than three hundred dollars, or by imprisonment in the county jail for not less than thirty days or more than six months, or by both such fine and imprisonment. It shall be the duty of the court before whom a conviction is had to, within ten days after judgment of conviction is rendered, forward a certified copy of said judgment of conviction to the chief grain inspector; and it is hereby made the duty of the chief grain inspector to revoke and annul any license heretofore issued to such person; and in such case no new license shall be granted to the person whose license is revoked, nor to anyone either directly or indirectly engaged with him in said business, for a period of one year.

History: En. Sec. 2, Ch. 69, L. 1915; re-en. Sec. 10913, R. C. M. 1921.

Collateral References

Warehousemen €== 6, 36. 93 C.J.S. Warehousemen and Safe Depositaries §§ 5, 86.

94-1117. (10914) Destruction of food in restraint of trade. It shall be unlawful for any person, firm, or corporation to destroy, or to withhold from

sale for a period of time which makes it necessary to destroy, in restraint of trade, any fish, fowl, animal, vegetable, or other stuff, products, or articles, which are customary food, or which are proper food for human beings, and are in fit sanitary condition to be used as such.

History: En. Sec. 1, Ch. 16, L. 1919; re-en. Sec. 10914, R. C. M. 1921.

Collateral References Food == 12. 36A C.J.S. Food §§ 21, 22, 26-28.

94-1118. (10915) Penalty for violation of act. Every person or firm or the manager or employee of every corporation violating any of the provisions of this act shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 16, L. 1919; re-en. Sec. 10915, R. C. M. 1921.

Collateral References Food €==23. 36A C.J.S. Food § 49.

CHAPTER 12

CRUELTY TO ANIMALS

Section 94-1201. Overdriving animals.

94-1202. Abandonment of disabled animals.
94-1203. Failure to provide proper food and drink to impounded animals.
94-1204. Carrying an animal in a cruel manner.
94-1205. Poisoning animals.

94-1206. Keeping cows in unhealthy places.

94-1207. Promoting fights between animals. 94-1208. Killing, maiming or poisoning livestock. 94-1209. Killing, maiming or poisoning livestock—complaint.

94-1201. (11508) Overdriving animals. Every person who overdrives or overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary food or drink, or shelter, in the case of household pets, or neglects or refuses to furnish it such food or drink, or shelter, in the case of household pets, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or shelter, in the case of household pets, or who willfully instigates or in any way engages in any act of cruelty to any animal, is guilty of a misdemeanor.

History: Ap. p. Sec. 144, p. 213, Bannack Stat.; re-en. Sec. 172, p. 309, Cod. Stat. 1871; re-en. Sec. 172, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 2, L. 1881; re-en. Sec. 215, 4th Div. Comp. Stat. 1887; en. Sec. 1090, Pen. C. 1895; re-en. Sec. 8774, Rev. C. 1907; re-en. Sec. 11508, R. C. M. 1921; amd. Sec. 1, Ch. 131, L. 1965; Cal. Pen. C. Sec. 597.

Collateral References

Animals \$\infty 40. 3 C.J.S. Animals §§ 67, 68, 70-74. 4 Am. Jur. 2d 276, 277, Animals, §§ 27,

94-1202. (11509) Abandonment of disabled animals. Every person being the owner, or in possession or having charge or custody of a maimed, diseased or infirm animal, who abandons and leaves such animal to die in the street, highway or public place, is guilty of a misdemeanor and such animal may be killed by any sheriff or peace officer in a humane manner, and the owner shall be liable for the necessary care of such animal while living and for the cost of disposing of the carcass.

History: Ap. p. Sec. 1091, Pen. C. 1895; Rev. C. 1907; re-en. Sec. 11509, R. C. M. en. Sec. 1, Ch. 35, L. 1905; re-en. Sec. 8775, 1921. Cal. Pen. C. Sec. 597f.

94-1203. (11510) Failure to provide proper food and drink to impounded animals. Every person who has impounded or confined any animal and refuses and neglects to supply such animal, during its confinement, with sufficient food, shelter and water, is punishable by imprisonment in the county jail not exceeding thirty days, or by a fine not exceeding one hundred dollars; or both.

History: En. Sec. 1092, Pen. C. 1895; 11510, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8776, Rev. C. 1907; re-en. Sec. 597e.

94-1204. (11511) Carrying an animal in a cruel manner. Every person who carries, or causes to be carried, in or upon any car, vessel or vehicle, or otherwise, any animal in a cruel manner, or so as to produce torture, is guilty of a misdemeanor.

History: En. Sec. 1093, Pen. C. 1895; 11511, R. C. M. 1921, Cal. Pen. C. Sec. re-en. Sec. 8777, Rev. C. 1907; re-en. Sec. 597a.

94-1205. (11512) Poisoning animals. Every person who willfully administers any poison to an animal the property of another or maliciously exposes any poisonous substance with the intent that the same shall be taken or swallowed by any such animal is punishable by imprisonment in the state prison not exceeding three years or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both fine and imprisonment.

History: En. Sec. 143, p. 213, Bannack Stat.; re-en. Sec. 171, p. 309, Cod. Stat. 1871; re-en. Sec. 171, 4th Div. Rev. Stat. 1879; re-en. Sec. 214, 4th Div. Comp. Stat. 1887; amd. Sec. 1094, Pen. C. 1895; re-en. Sec. 8778, Rev. C. 1907; re-en. Sec. 11512, R. C. M. 1921. Cal. Pen. C. Sec. 596.

Collateral References

Animals \$\\$ 236, 241, 242, 246-254, 337.

94-1206. (11513) Keeping cows in unhealthy places. Every person who keeps a cow or any animal for the production of milk in a crowded or unhealthy place or in a diseased condition, or feeds such cow or animal upon any food that produces impure or unwholesome milk, is punishable by imprisonment in the county jail not exceeding three months or by fine not exceeding two hundred dollars, or both.

History: En. Sec. 1095, Pen. C. 1895; re-en. Sec. 8779, Rev. C. 1907; re-en. Sec. 11513, R. C. M. 1921.

Collateral References
Animals©=181.
3 C.J.S. Animals § 63.

94-1207. (11514) Promoting fights between animals. Every person who instigates, promotes or carries on, or does any act as principal, assistant, referee or umpire, or is a witness of or in any way aids in the furtherance of any fight between cocks or other birds, or dogs, bulls, bears, or other ani-

mals premeditated by any person owning or having custody of such birds or animals, is punishable by imprisonment in the county jail not exceeding three months or by fine not exceeding two hundred dollars, or both.

History: En. Sec. 1096, Pen. C. 1895; re-en. Sec. 8780, Rev. C. 1907; re-en. Sec. 11514, R. C. M. 1921. Cal. Pen. C. Sec. 597b.

Collateral References

Theaters and Shows \$\sim 9.

86 C.J.S. Theaters and Shows \$\sim 58, 59.

4 Am. Jur. 2d 277, Animals \\$28.

94-1208. (11515) Killing, maiming or poisoning livestock. Every person who willfully and maliciously kills or maims any livestock of whatsoever kind, character or description, not his own, by whatsoever means, or who willfully and maliciously places upon the public ranges or any other lands except his own inclosed tract or tracts, any poison, poisonous substance, or other thing known to be injurious or harmful, or likely to produce the death of any livestock of whatsoever kind, character or description, not his own, is guilty of a felony, and upon conviction shall be punished by not less than one nor more than ten years' imprisonment in the state prison. This act is not intended to prevent or restrict the right of any person to use poison in carcasses or bait on the public range, for the purpose of poisoning coyotes, wolves or other animals destructive to livestock.

History: En. Sec. 1, Ch. 37, L. 1903; re-en. Sec. 8781, Rev. C. 1907; re-en. Sec. 11515, R. C. M. 1921.

Intent to Maim

Evidence showing that defendant, charged with attempt to maim horses, had fired a load of shot into each at a point nearest the heart from a distance of ten feet, was sufficient to warrant the inference that he intended to either kill or maim them, held sufficient to support the judgment of conviction, as against the contention that the evidence showed an intent to kill and not to maim, and that

therefore the judgment should be reversed. State v. Benson, 91 M 21, 24, 5 P 2d 223.

"Maiming" Defined

To constitute the act of "maiming" an animal, a felony within the meaning of this section, permanent injury must have been inflicted. State v. Benson, 91 M 21, 24, 5 P 2d 223.

Collateral References

Animals \$\infty 45.

3 C.J.S. Animals §§ 236, 241, 242, 246-254, 337.

94-1209. (11515.1) Killing, maiming or poisoning livestock—complaint. In any prosecution for the violation of the provisions of section 94-1208, prohibiting the malicious killing, maiming or poisoning of livestock, not the property of the defendant, it shall not be necessary for the state to allege in the complaint or information or to prove the ownership of the livestock so alleged to have been killed, maimed or poisoned, but it shall be sufficient to allege in the complaint or information that the owner of such livestock is unknown and prove that the livestock killed, poisoned or maimed was not the property of the defendant.

History: En. Sec. 1, Ch. 62, L. 1923.

CHAPTER 13

DUELS AND CHALLENGES

Section 94-1301. Duel defined.

94-1302. Punishment for fighting a duel, when death ensues.

94-1303. Punishment for fighting a duel, although death does not ensue.

94-1304. Posting for not fighting.

94-1305. Duties of officers to prevent duels.

94-1306. Leaving the state with intent to evade laws against dueling.

94-1307. Witness' privilege.

94-1301. (10981) Duel defined. A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel.

History: En. Sec. 410, Pen. C. 1895; re-en. Sec. 8317, Rev. C. 1907; re-en. Sec. 10981, R. C. M. 1921, Cal. Pen. C. Sec. 225, 28 C.J.S. Dueling § 1. 25 Am. Jur. 2d 347, Dueling § 1.

Collateral References Dueling 1.

Challenge to duel as substantive common-law offense. 35 ALR 962.

94-1302. (10982) Punishment for fighting a duel, when death ensues. Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the state prison not less than one nor more than seven years.

History: Ap. p. Sec. 38, p. 183, Bannack Stat.; re-en. Sec. 23, p. 274, Cod. Stat. 1871; re-en. Sec. 23, 4th Div. Rev. Stat. 1879; re-en. Sec. 23, 4th Div. Comp. Stat. 1887; en. Sec. 411, Pen. C. 1895; re-en. Sec. 8318, Rev. C. 1907; re-en. Sec. 10982, R. C. M. 1921, Cal. Pen. C. Sec. 226.

Collateral References
Dueling\$\ins\$5.
28 C.J.S. Dueling \\$2.

25 Am. Jur. 2d 348, Dueling § 3.

Challenge to duel as substantive common-law offense, 35 ALR 962.

94-1303. (10983) Punishment for fighting a duel, although death does not ensue. Every person who fights a duel, or accepts or sends a challenge to fight a duel, is punishable by imprisonment in the state prison or in a county jail not exceeding one year.

History: En. Sec. 412, Pen. C. 1895; re-en. Sec. 8319, Rev. C. 1907; re-en. Sec. 10983, R. C. M. 1921. Cal. Pen. C. Sec. 227.

94-1304. (10984) Posting for not fighting. Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another, for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

History: En. Sec. 413, Pen. C. 1895; re-en. Sec. 8320, Rev. C. 1907; re-en. Sec. 10984, R. C. M. 1921. Cal. Pen. C. Sec. 229.

94-1305. (10985) Duties of officers to prevent duels. Every judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any person to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding one thousand dollars.

History: En. Sec. 124, p. 207, Bannack Stat.; re-en. Sec. 138, p. 300, Cod. Stat. 1871; re-en. Sec. 138, 4th Div. Rev. Stat. 1879; re-en. Sec. 153, 4th Div. Comp. Stat.

1887; amd. Sec. 414, Pen. C. 1895; re-en. Sec. 8321, Rev. C. 1907; re-en. Sec. 10985, R. C. M. 1921. Cal. Pen. C. Sec. 230.

94-1306. (10986) Leaving the state with intent to evade laws against dueling. Every person who leaves this state with intent to evade any of the

provisions of this chapter, and to commit any act out of this state, such as is prohibited by this chapter, and who does any act, although out of this state, which would be punishable by such provisions if committed within this state, is punishable in the same manner as he would have been in case such act had been committed within this state.

History: En. Sec. 415, Pen. C. 1895; re-en. Sec. 8322, Rev. C. 1907; re-en. Sec. 10986, R. C. M. 1921. Cal. Pen. C. Sec. 231. Collateral References Criminal Law 97 (1). 22 C.J.S. Criminal Law § 134.

94-1307. (10987) Witness' privilege. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of any of the provisions of the six preceding sections, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

History: En. Sec. 416, Pen. C. 1895; re-en. Sec. 8323, Rev. C. 1907; re-en. Sec. 10987, R. C. M. 1921. Cal. Pen. C. Sec. 232. 22A C.J.S. Criminal Law §§ 654-656; 98

C.J.S. Witnesses §§ 431, 439.

21 Am. Jur. 2d 215 et seq., Criminal Law § 146 et seq.; 58 Am. Jur. 72 et seq., Witnesses, § 84 et seq.

Collateral References

Criminal Law 393 (1); Witnesses

CHAPTER 14

ELECTION FRAUDS AND OFFENSES—CORRUPT PRACTICES ACT

Section 94-1401. Violation of election laws by certain officers a felony. 94-1402. Fraudulent registration a felony. 94-1403. Fraudulent voting.

94-1404. Attempting to vote without being qualified.

94-1405. Procuring illegal voting. 94-1406. Changing ballots or altering returns by election officers.

94-1407. Judges unfolding or marking ballots.

94-1408. Forging or altering returns.

94-1409. 94-1410. Adding to or subtracting from votes given.

Persons aiding and abetting.

94-1411. Intimidating, corrupting, deceiving or defrauding electors.

94-1412. Offenses under the election laws.

94-1413. Officers of election not to electioneer, etc.

94-1414. Offenses at an election.

Furnishing money or entertainment for, or procuring attendance of, 94-1415. electors.

94-1416. Unlawful offer to appoint to office.

94-1417. Communication of same.

Bribing members of legislative caucuses, etc.

94-1418. 94-1419. Preventing public meetings of electors.

94-1420. Disturbances of public meetings of electors.

94-1421. Betting on elections.

Violation of election laws. 94-1422.

Bribery. 94-1423.

94-1424. Unlawful acts of employers. 94-1425. Fines paid into school fund.

94-1426. Violation of act voids election.

94-1427. Expenditure by or for candidate for office.

94-1428. Limitation of expenditures by candidate—by party organizations—by relatives.

94-1429. Definition of terms.

94-1430. Statement by candidate as to moneys expended—filing after election penalty.

- 94-1431. Accounts of expenditures by political committees and other persons statement. 94-1432. Copies of act to be furnished certain public officers and candidates. 94-1433. Inspection of accounts-complaints-statement of receipts. 94-1434. Prosecutions for failure to file statement. 94-1435. Jurisdiction—court may compel filing of statements. Record of statements—copies. 94-1436. Payments in name of undisclosed principal. 94-1437. 94-1438. Promise to procure appointment or election. 94-1439. Public officer or employee not to contribute funds. 94-1440. Certain public officers prohibited from acting as delegates or members of political committee. Transfer of convention credential. 94-1441. Inducing person to be or not to be candidate. 94-1442. 94-1443. What demands or requests shall not be made of candidates. Contributions from corporations, public utilities and others. 94-1444. 94-1445. Treating. 94-1446. Challenging voters—procedure. 94-1447. Coercion or undue influence of voters. Bets or wagers on election results. 94-1448. 94-1449. Personating another elector-penalty. 94-1450. Corrupt practice, what constitutes. Compensating voter for loss of time-badges and insignia. 94-1451. 94-1452. Publications in newspapers and periodicals. Solicitation of votes on election day. Political criminal libel. 94-1453. 94-1454. 94-1455. Filing of statement of expenses by candidate. 94-1456. Inducement to accept or decline nomination. 94-1457. Forfeiture of nomination or office for violation of law, when not worked. Punishment for violation of act. 94-1458. 94-1459. Time for commencing contest. 94-1460. Court having jurisdiction of proceedings. 94-1461. Repealed. Duty of county attorney on violation of act-penalty for neglect or 94-1462. refusal to act. 94-1463. Declaration of result of election after rejection of illegal votes. 94-1464. Grounds for contest of nomination or office. 94-1465. Nomination or election not to be vacated, when. 94-1466. Reception of illegal votes, allegations and evidence. 94-1467. Contents of contest petition—amendment—bond—costs—citation precedence. 94-1468. Hearing of contest. 94-1469. Corporations-proceedings against, for violation of act. 94-1470. Penalty for violations not otherwise provided for. 94-1471. Advancement of cases—dismissal, when—privileges of witnesses. Form of complaint. 94-1472. 94-1473. Form of statement of expenses. False oaths or affidavits-perjury. 94-1474. 94-1475. Political literature to contain name of officer of organization or person publishing and producing. 94-1476. Violation of preceding section a misdemeanor.
- 94-1401. (10747) Violation of election laws by certain officers a felony. Every-person charged with the performance of any duty, under the provisions of any law of this state relating to elections, or the registration of the names of electors, or the canvassing of the returns of election, who willfully neglects or refuses to perform such duty, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or both.

History: En. Sec. 60, Pen. C. 1895; re-en. Sec. 8124, Rev. C. 1907; re-en. Sec. 10747, R. C. M. 1921. Cal. Pen. C. Sec. 41.

Cross-Reference

Election laws, secs. 23-2601 to 23-4611.

Collateral References

Elections 314.

29 C.J.S. Elections § 327. 26 Am. Jur. 2d 188, Elections, § 376.

Criminal responsibility of one co-operating in violation of election law. 74 ALR 1113 and 131 ALR 1322.

94-1402. (10748) Fraudulent registration a felony. Every person who willfully causes, procures, or allows himself to be registered in the official register of any election district of any county, knowing himself not to be entitled to such registration, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail or state prison not exceeding one year, or both. In all cases where, on the trial of the person charged with any offense under the provisions of this section, it appears in evidence that the accused stands registered in such register of any county, without being qualified for such registration, the court must order such registration to be canceled.

History: En. Sec. 61, Pen. C. 1895; reen. Sec. 8125, Rev. C. 1907; re-en. Sec. 10748, R. C. M. 1921. Cal. Pen. C. Sec. 42.

Cross-Reference

Registration, sec. 23-3001 et seq.

Collateral References

Elections 312.
29 C.J.S. Elections § 326.
26 Am. Jur. 2d 185 et seq., Elections, § 371 et seq.

Constitutionality of corrupt practices acts. 69 ALR 377.

94-1403. (10749) Fraudulent voting. Every person not entitled to vote who fraudulently votes, and every person who votes more than once at any one election, or changes any ballot after the same has been deposited in the ballot box, or adds, or attempts to add, any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted; or adds to, or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to carry away or destroy, any poll lists, check lists, or ballots, or ballot box, for the purpose of breaking up or invalidating such election, or willfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held and lawfully conducted, is guilty of a felony.

History: En. Sec. 62, Pen. C. 1895; re-en. Sec. 8126, Rev. C. 1907; re-en. Sec. 10749, R. C. M. 1921. Cal. Pen. C. Sec. 45.

Cross-Reference

Conduct prohibited at polls, sec. 23-3605.

Collateral References

Elections 313, 319. 29 C.J.S. Elections §§ 325, 330. 26 Am. Jur. 2d 187, Elections, § 375.

94-1404. (10750) Attempting to vote without being qualified. Every person not entitled to vote, who fraudulently attempts to vote or register, or

who, being entitled to vote, attempts to vote or register more than once at any election, is guilty of a misdemeanor.

History: En. Sec. 63, Pen. C. 1895; re-en. Sec. 8127, Rev. C. 1907; re-en. Sec. 10750, R. C. M. 1921. Cal. Pen. C. Sec. 46.

Collateral References

Elections 312, 313. 29 C.J.S. Elections §§ 325, 326. 26 Am. Jur. 2d 187, Elections, § 375.

94-1405. (10751) Procuring illegal voting. Every person who procures, aids, assists, counsels, or advises another to register or give or offer his vote at any election, knowing that the person is not entitled to vote or register, is guilty of a misdemeanor.

History: En. Sec. 64, Pen. C. 1895; re-en. Sec. 8128, Rev. C. 1907; re-en. Sec. 10751, R. C. M. 1921. Cal. Pen. C. Sec. 47. Collateral References

Elections \$313. 29 C.J.S. Elections \$325. 26 Am. Jur. 2d 187, Elections, \$375.

94-1406. (10752) Changing ballots or altering returns by election officers. Every officer or clerk of election who aids in changing or destroying any poll list or cheek list, or in placing any ballots in the ballot box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with, the ballots polled, any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so, when in his power to prevent it, or carries away or destroys, or knowingly allows another to carry away or destroy, any poll list, check list, ballot box, or ballots lawfully polled, is guilty of a felony.

History: En. Sec. 65, Pen. C. 1895; re-en. Sec. 8129, Rev. C. 1907; re-en. Sec. 10752, R. C. M. 1921. Cal. Pen. C. Sec. 48.

29 C.J.S. Elections § 327.

26 Am. Jur. 2d 185 et seq., Elections, § 371 et seq.

Collateral References Elections 314.

Constitutionality of corrupt practices acts. 69 ALR 377.

94-1407. (10753) Judges unfolding or marking ballots. Every judge or clerk of an election who, previous to putting the ballot of an elector in the ballot box, attempts to find out any name on such ballot, or who opens or suffers the folded ballot of any elector which has been handed in, to be opened or examined previous to putting the same into the ballot box, or who makes or places any mark or device on any folded ballot, with the view to ascertain the name of any person for whom the elector has voted, is punishable by imprisonment in the county jail for a period of six months, or in the state prison not exceeding two years, or by fine, not exceeding five hundred dollars, or by both.

History: En. Sec. 66, Pen. C. 1895; re-en. Sec. 8130, Rev. C. 1907; re-en. Sec. 10753, R. C. M. 1921. Cal. Pen. C. Sec. 49.

Collateral References

Elections 314. 29 C.J.S. Elections § 327. 26 Am. Jur. 2d 188, Elections, § 376.

Cross-Reference

Putting ballots in box, secs. 23-3607, 23-3608.

94-1408. (10754) Forging or altering returns. Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or willfully substitutes forged or counterfeit returns of election in the place of the true returns for a precinct, town, or ward where an election was actually held, is punishable by imprisonment in the state prison for a term not less than two nor more than ten years.

History: En. Sec. 67, Pen. C. 1895; re-en. Sec. 8131, Rev. C. 1907; re-en. Sec. 10754, R. C. M. 1921. Cal. Pen. C. Sec. 50.

Cross-Reference

Canvass of votes, sec. 23-4001 et seq.

Collateral References

Elections©=318.
29 C.J.S. Elections § 331.

94-1409. (10755) Adding to or subtracting from votes given. Every person who willfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is punishable by imprisonment in the state prison for not less than one nor more than five years.

History: En. Sec. 68, Pen. C. 1895; re-en. Sec. 8132, Rev. C. 1907; re-en. Sec. 10755, R. C. M. 1921. Cal. Pen. C. Sec. 51.

94-1410. (10756) Persons aiding and abetting. Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections is punishable by imprisonment in the county jail for a period of six months, or in the state prison not exceeding two years.

History: En. Sec. 69, Pen. C. 1895; re-en. Sec. 8133, Rev. C. 1907; re-en. Sec. 10756, R. C. M. 1921, Cal. Pen. C. Sec. 52. Collateral References
Elections©=322.
29 C.J.S. Elections § 336.
26 Am. Jur. 2d 186, Elections, § 373.

94-1411. (10757) Intimidating, corrupting, deceiving or defrauding electors. Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly, attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever to awe, restrain, hinder, or disturb any elector in the free exercise of the right of suffrage, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person for any office than he intended or desired to vote for; or who, being judge or clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menaces or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars, or imprisonment not to exceed one year, or both.

History: En. Sec. 70, Pen. C. 1895; re-en. Sec. 8134, Rev. C. 1907; re-en. Sec. 10757, R. C. M. 1921. Cal. Pen. C. Sec. 53.

Cross-Reference

Bribery of electors, sec. 94-1423.

Collateral References

Elections 316, 319.
29 C.J.S. Elections §§ 330, 332.
26 Am. Jur. 2d 195, 196, Elections, §§ 382, 383.

94-1412. (10758) Offenses under the election laws. Every person who falsely makes, or fraudulently defaces or destroys, the certificates of nomi-

nation of candidates for office, to be filled by the electors at any election, or any part thereof, or files or receives for filing any certificate of nomination, knowing the same, or any part thereof, to be falsely made, or suppresses any certificate of nomination, which has been duly filed, or any part thereof, or forges or falsely makes the official endorsement on any ballot, is guilty of a felony, and upon conviction thereof is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 71, Pen. C. 1895; re-en. Sec. 8135, Rev. C. 1907; re-en. Sec. 10758, R. C. M. 1921,

Collateral References
Elections@=309.
29 C.J.S. Elections §§ 324, 334.

Cross-Reference

Nomination, sec. 23-3301 et seg.

94-1413. (10759) Officers of election not to electioneer, etc. Every officer or clerk of election who deposits in a ballot box a ballot on which the official stamp, as provided by law, does not appear, or does any electioneering on election day, is guilty of a misdemeanor, and upon conviction is punishable by imprisonment not to exceed six months, or by a fine not less than fifty nor more than five hundred dollars, or both.

History: En. Sec. 72, Pen. C. 1895; re-en. Sec. 8136, Rev. C. 1907; re-en. Sec. 10759, R. C. M. 1921.

Cross-Reference

Electioneering by election officers, sec. 23-3605.

Collateral References

Elections 314.
29 C.J.S. Elections § 327.
26 Am. Jur. 2d 186, Elections, § 374.

94-1414. (10760) Offenses at an election. Every person who, during an election, removes or destroys any of the supplies or other conveniences placed in the booths or compartments for the purpose of enabling a voter to prepare his ballot, or prior to or on the day of election willfully defaces or destroys any list of candidates posted in accordance with the provisions of law, or during an election tears down or defaces the cards printed for the instruction of voters, or does any electioneering on election day within any polling place or any building in which an election is being held, or within twenty-five feet thereof, or obstructs the doors or entries thereof, or removes any ballot from the polling place before the closing of the polls, or shows his ballot to any person after it is marked so as to reveal the contents thereof, or solicits an elector to show his ballot after it is marked, or places a mark on his ballot by which it may afterward be identified, or receives a ballot from any other person than one of the judges of the election having charge of the ballots, or votes or offers to vote any ballot except such as he has received from the judges of election having charge of the ballots, or does not return the ballot before leaving the polling place, delivered to him by such judges, and which he has not voted, is guilty of a misdemeanor, and is punishable by a fine not exceeding one hundred dollars.

History: En. Sec. 73, Pen. C. 1895; re-en. Sec. 8137, Rev. C. 1907; re-en. Sec. 10760, R. C. M. 1921.

Cross-Reference

Conduct prohibited at polls, sec. 23-3605.

Collateral References

Elections \$319. 29 C.J.S. Elections \$330. 26 Am. Jur. 2d 197, Elections, §385.

- 94-1415. (10761) Furnishing money or entertainment for, or procuring attendance of, electors. Every person who, with the intention to promote the election of himself or any other person, either:
- 1. Furnishes entertainments, at his expense, to any meeting of electors previous to or during an election;
 - 2. Pays for, procures, or engages to pay for any such entertainment;
- 3. Furnishes or engages to pay any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring the attendance of voters at the polls, except for the conveyance of voters who are sick or infirm;
- 4. Furnishes or engages to pay or deliver any money or property for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions, and of printing and circulating ballots, handbills, and other papers, previous to such election; is guilty of a misdemeanor.

History: En. Sec. 74, Pen. C. 1895; re-en. Sec. 8138, Rev. C. 1907; re-en. Sec. 10761, R. C. M. 1921. Cal. Pen. C. Sec. 54.

26 Am. Jur. 2d 110, 195, Elections, §§ 285, 382.

Collateral References

Elections 317. 29 C.J.S. Elections §§ 329, 356.

Treating of voters by candidate for office as violation of corrupt practices or similar act. 2 ALR 402.

94-1416. (10762) Unlawful offer to appoint to office. Every person who, being a candidate at any election, offers, or agrees to appoint or procure, the appointment of any particular person to office, as an inducement or consideration to any person to vote for, or to procure or aid in procuring the election of such candidate, is guilty of a misdemeanor.

History: En. Sec. 75, Pen. C. 1895; re-en. Sec. 8139, Rev. C. 1907; re-en. Sec. 10762, R. C. M. 1921, Cal. Pen. C. Sec. 55.

94-1417. (10763) Communication of same. Every person, not being a candidate, who communicates any offer, made in violation of the last section, to any person, with intent to induce him to vote for, or to procure or to aid in procuring the election of the candidate making the offer, is guilty of a misdemeanor.

History: En. Sec. 76, Pen. C. 1895; re-en. Sec. 8140, Rev. C. 1907; re-en. Sec. 10763, R. C. M. 1921. Cal. Pen. C. Sec. 56.

94-1418. (10764) Bribing members of legislative caucuses, etc. Every person who gives or offers a bribe to any officer or member of any legislative caucus, political convention, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust, or profit, in this state, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 77, Pen. C. 1895; re-en. Sec. 8141, Rev. C. 1907; re-en. Sec. 10764, R. C. M. 1921. Cal. Pen. C. Sec. 57.

Collateral References

Elections 316.

29 C.J.S. Elections § 332. 12 Am. Jur. 2d 755, Bribery, § 12; 26 Am. Jur. 2d 189, Elections, § 377.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Statement by candidate regarding salary or fees of office as bribery. 106 ALR 493. Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

94-1419. (10765) Preventing public meetings of electors. Every person who, by threats, intimidations, or violence, willfully hinders or prevents electors from assembling in public meeting for the consideration of public questions, is guilty of a misdemeanor.

History: En. Sec. 78, Pen. C. 1895; re-en. Sec. 8142, Rev. C. 1907; re-en. Sec. 10765, R. C. M. 1921. Cal. Pen. C. Sec. 58.

Collateral References

Elections 320. 29 C.J.S. Elections § 333.

94-1420. (10766) Disturbances of public meetings of electors. Every person who willfully disturbs or breaks up any public meeting of electors or others, lawfully being held for the purpose of considering public questions, or any public school or public school meeting, is guilty of a misdemeanor.

History: En. Sec. 79, Pen. C. 1895; re-en. Sec. 8143, Rev. C. 1907; re-en. Sec. 10766, R. C. M. 1921.

Collateral References

Disturbance of Public Assemblage 1. 27 C.J.S. Disturbance of Public Meetings § 1.

Cross-Reference

Disturbance of school, sec. 75-2409.

94-1421. (10767) Betting on elections. Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor.

History: En. Sec. 80, Pen. C. 1895; re-en. Sec. 8144, Rev. C. 1907; re-en. Sec. 10767, R. C. M. 1921, Cal. Pen. C. Sec. 60.

Collateral References

Elections 315. 29 C.J.S. Elections § 328.

26 Am. Jur. 2d 189, Elections, § 378.

(10768) Violation of election laws. Every person who willfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or both.

History: En. Sec. 81, Pen. C. 1895; re-en. Sec. 8145, Rev. C. 1907; re-en. Sec. 10768, R. C. M. 1921. Cal. Pen. C. Sec. 61.

Criminal responsibility of one co-operating in violation of election law. 74 ALR 1113 and 131 ALR 1322.

Collateral References

Elections 332.

29 C.J.S. Elections § 353.

94-1423. (10769) Bribery. The following persons shall be deemed guilty of bribery, and shall be punished by a fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding one year:

- 1. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises, any money or valuable consideration, or promises to procure, or endeavors to procure, any money or valuable consideration, to or for any election, or to or for any person on behalf of any elector, or to or for any person, in order to induce any elector to vote or refrain from voting, or corruptly does any such act as aforesaid;
- 2. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, or procures, or agrees to give or procure, or offers or promises, any office, place, or employment, to or for any elector, or to or for any other person, in order to induce such elector to vote or refrain from voting, or corruptly does any such act as aforesaid, on account of any elector having voted or refrained from voting at any election;
- 3. Every person who, directly or indirectly, by himself or by any other persons on his behalf, makes any gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavor to procure the return of any person to serve in the legislative assembly, or the vote of any elector at any election;
- 4. Every person who, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procures or promises, or endeavors to procure, the election of any candidate to the legislative assembly, or the vote of any elector at any election;
- 5. Every person who advances or pays, or causes to be paid, any money to, or to the use of any other person, with the intent that such money, or any part thereof, shall be expended in bribery, or in corrupt practices, at any election, or who knowingly pays, or causes to be paid, any money to any person in discharge or repayment of any money wholly or in part expended in bribery or corrupt practices at any election;
- 6. Every elector who, before or during any election, directly or indirectly, by himself or any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, valuable consideration, office, place, or employment, for himself or any other person, for voting or agreeing to vote, or for refusing or agreeing to refrain from voting at any election;
- 7. Every person who, after any election, directly or indirectly, by himself or by any other person in his behalf, receives any money, gift, loan, valuable consideration, office, place, or employment, for having voted or refrained from voting, or having induced any other person to vote or refrain from voting, at any election;
- 8. Every person, whether an elector or otherwise, who, before or during any election, directly or indirectly, by himself or by any other person on his behalf, makes approaches to any candidate or agent, or any person representing or acting on behalf of any candidate at such election, and asks for, or offers to agree or contract for, any money, gift, loan, valuable consideration, office, place, or employment for himself or any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at such election;

- 9. Every person, whether an elector or otherwise, who, after an election, directly or indirectly, by himself or by any other person on his behalf, makes approaches to any candidate, or any agent or person representing or acting on behalf of any candidate, and asks for or offers to receive any money, gift, loan, valuable consideration, office, place, or employment, for himself or any other person, for having voted or refrained from voting, or having induced any other person to vote or refrain from voting at such election:
- 10. Every person who, in order to induce a person to allow himself to be nominated as a candidate, or to refrain from becoming a candidate. or to withdraw if he has so become, gives or lends any money or valuable consideration whatever, or agrees to give or lend, or offers or promises any such money or valuable consideration, or promises to procure or try to procure, or tries to procure, for such person, or for any other person, any money or valuable consideration:
- 11. Every person who, for the purpose and with the intent in the last preceding subsection mentioned, gives or procures any office, place, or employment, or agrees to give or procure, or offers or promises, such office. place, or employment, or endeavors to procure, or promises to procure or to endeavor to procure, such office, place, or employment, to or for such person or any other person;
- Every person who, in consideration of any gift, loan, offer, promise, or agreement, as mentioned in the two last preceding subsections, allows himself to be nominated, or refuses to allow himself to be nominated, as a candidate at an election, or withdraws if he has been so nominated;
- Every elector, candidate for nomination, nominee, or political committee who shall pay, or offer to pay, the fee for any person who is about to, or has made his declaration of intention, or has taken out, or is about to take out, his final papers as a citizen of the United States; and every person who receives any money or other valuable thing to pay such fee, or permits the same to be paid for him.

History: En. Sec. 105, Pen. C. 1895; re-en. Sec. 8169, Rev. C. 1907; re-en. Sec. 10769, R. C. M. 1921, Cal. Pen. C. Sec. 54b.

Cross-Reference

Intimidating voters, sec. 94-1411.

Collateral References

Elections 316.

29 C.J.S. Elections § 332.

12 Am. Jur. 2d 748 et seq., Bribery, § 1 et seq.; 26 Am. Jur. 2d 108, 189, Elections, §§ 282; 377.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Statement by candidate regarding salary or fees of office as bribery. 106 ALR 493. Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263. Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

94-1424. (10770) Unlawful acts of employers. It shall be unlawful for any employer, in paying his employees the salary or wages due them, to enclose their pay in "pay envelopes" upon which there is written or printed the name of any candidate or political mottoes, devices, or arguments containing threats or promises, express or implied, calculated or intended to influence the political opinions or actions of such employees. Nor shall it be lawful for an employer, within ninety days of an election, to put

up or otherwise exhibit in his factory, workshop, or other establishment or place where his workmen or employees may be working, any handbill or placard containing any threat or promise, notice, or information, that in ease any particular ticket or political party, or organization, or candidate, shall be elected, work in his place or establishment will cease, in whole or in part, or shall be continued or increased, or his place or establishment be closed up, or the salaries or wages of his workmen or employees be reduced or increased, or other threats, or promises, express or implied, intended or calculated to influence the political opinions or actions of his workmen or employees. This section shall apply to corporations as well as individuals, and any person violating the provisions of this section is guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and imprisonment not exceeding six months in the county jail, and any corporation violating this section shall be punished by fine not to exceed five thousand dollars, or forfeit its charter, or both such fine and forfeiture.

History: En. Sec. 109, Pen. C. 1895; re-en. Sec. 8173, Rev. C. 1907; re-en. Sec. 10770, R. C. M. 1921.

Collateral References

Elections 317.
29 C.J.S. Elections §§ 329, 350.
26 Am. Jur. 2d 110, 191, 195, Elections, §§ 286, 380, 383.

94-1425. (10771) Fines paid into school fund. All fines imposed and collected under the preceding sections shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed.

History: En. Sec. 110, Pen. C. 1895; re-en. Sec. 8174, Rev. C. 1907; re-en. Sec. 10771, R. C. M. 1921.

NOTE.—The sections referred to herein were sections 8169 and 8173 of the Re-

vised Codes of 1907 (sections 94-1423 and 94-1424 of this code).

Collateral References Fines 20.

Fines 20. 36A C.J.S. Fines § 19.

94-1426. (10772) Violation of act voids election. If it be proved before any court for the trial of election contests or petitions that any corrupt practice has been committed, by or with the actual knowledge and consent of any candidate at an election, if he has been elected, such election shall be void, and shall be so adjudged.

History: En. Sec. 111, Pen. C. 1895; re-en. Sec. 8175, Rev. C. 1907; re-en. Sec. 10772, R. C. M. 1921.

NOTE.—The corrupt practices referred to in this section were those specified in sections 8169 and 8173 of the Revised Codes of 1907 (sections 94-1423 and 94-1424 of this code).

Collateral References

Elections 231.
29 C.J.S. Elections § 216.
26 Am. Jur. 2d 111, Elections, § 287.

94-1427. (10773) Expenditure by or for candidate for office. No sums of money shall be paid, and no expenses authorized or incurred, by or on behalf of any candidate to be paid by him, except such as he may pay to the state for printing, as herein provided, in his campaign for nomination to any public office or position in this state, in excess of fifteen per cent of one year's compensation or salary of the office for which he is a candidate; provided, that no candidate shall be restricted to less than one hundred

dollars in his campaign for such nomination. No sums of money shall be paid, and no expenses authorized or incurred, contrary to the provisions of this act, for or on behalf of any candidate for nomination. For the purposes of this law, the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employee, or fellow official or fellow employee of a corporation shall be deemed to be that of the candidate himself.

History: En. Sec. 1, Init. Act, Nov. 1912; re-en. Sec. 10773, R. C. M. 1921.

Compiler's Note

See Compiler's Note to section 94-1428.

Constitutionality

Held, that under section 9, article IX, of the state constitution, the legislature had the power to authorize the district court, by means of the Corrupt Practices Act (sections 94-1427 to 94-1460, 94-1462 to 94-1474), to find a vacancy in an office for violation of the provisions of such act. State ex rel. Kommers v. District Court, 109 M 287, 292, 96 P 2d 271.

Election for Location of County Seat

Since this act does not authorize a contest of the election for the location of a county seat, a demurrer to the petition seeking to initiate such a proceeding was properly sustained. Cadle v. Town of Baker, 51 M 176, 181, 149 P 960. See also Poe v. Sheridan County, 52 M 279, 290, 157 P 185.

Failure To Prove Fraud and Corruption

Held, that if the Corrupt Practices Act applies to county seat elections, the finding of the trial court that contestant failed to prove fraud and corruption on the part of partisans of the successful candidate, in furnishing sandwiches, cake, coffee, etc., at a public meeting and dance

a few days before election, and supplying oil and gasoline for automobiles to convey electors to polling places during a snow-storm, no discrimination being made between those favoring one place or the other, and that such actions did not affect the result, was sustained by the evidence. Atkinson v. Roosevelt County, 71 M 165, 184, 227 P 811.

Operation and Effect

While the Corrupt Practices Act is in force by virtue of a vote of the people, it has no greater efficacy as a statute than if it had been enacted by the legislature. State ex rel. Smith v. District Court, 50 M 134, 138, 145 P 721.

Purpose of Corrupt Practices Act

The purpose of the Corrupt Practices Act, sections 94-1427 to 94-1460, 94-1462 to 94-1474, is not only to guarantee the purity of elections and to assure a free exercise of the franchise by the voter, but to protect candidates from the pressure of those who operate at their expense, and by forbidding certain practices, afford them an equal opportunity. Kommers v. Palagi, 111 M 293, 297, 108 P 2d 208.

Collateral References

Elections ≈ 231, 317. 29 C.J.S. Elections § 216. 26 Am. Jur. 2d 111, 193, Elections, §§ 287, 381.

94-1428. (10774) Limitation of expenditures by candidate—by party organizations—by relatives. No sums of money shall be paid and no expenses authorized or incurred by or on behalf of any candidate who has received the nomination to any public office or position in this state, except such as he may contribute towards payment for his political party's or independent statement in the pamphlet herein provided for, to be paid by him in his campaign for election, in excess of ten per cent of one year's salary or compensation of the office for which he is nominated; provided, that no candidate shall be restricted to less than one hundred dollars. No sum of money shall be paid and no expenses authorized or incurred by or on behalf of any political party or organization to promote the success of the principles or candidates of such party or organization, contrary to the provisions of this act. For the purposes of this act, the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employee, or fellow official

or fellow employee of a corporation, shall be deemed to be that of the candidate himself.

History: En. Sec. 8, Init. Act, Nov. 1912; re-en. Sec. 10774, R. C. M. 1921.

Compiler's Note

This section and section 94-1427 were part of the original Corrupt Practices Act (Init. Act, Nov. 1912); the remaining provisions of the act were repealed by Laws 1919, Ch. 88, Sec. 1.

The pamphlet referred to herein was provided for by sections 6-9 of the original act which stated that a pamphlet containing statements and photographic cuts submitted by political parties should be printed by the governing authority.

Definition of Terms as Applied to Sheriffs

The words "salary" and "compensation" do not include the value of the living quarters furnished to sheriff by the county, for the furnishing of which there is no provision of law, the amount received for the board of prisoners both federal and state in his charge, nor mileage collected by his office. "By and on behalf" mean by the candidate himself or by someone who acts for him in the sense that an

agent acts for and on behalf of his principal, i.e., as his political agent; the authority to so act may be express or implied. Kommers v. Palagi, 111 M 293, 299, 108 P 2d 208.

Illegal Expenditures by Political Club

In an election contest brought under the Corrupt Practices Act, under the evidence presented, including brewery books showing delivery of beer to an alleged political club but actually being ordered and received by a sheriff's deputies, evidence held to sustain findings that illegal expenditures made by an alleged political club were actually those of a candidate running for a second term for sheriff and his deputies, and that they were made by and on his behalf within the meaning of this section. Kommers v. Palagi, 111 M 293, 303, 108 P 2d 208.

Collateral References

Elections \$\sim 231, 317.
29 C.J.S. Elections \$\\$ 216, 329.
26 Am. Jur. 2d 111, 193, Elections, \$\\$ 287, 381.

94-1429. (10775) **Definition of terms**. Terms used in this act shall be construed as follows, unless other meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intent of the law:

"Persons" shall apply to any individual, male or female, and, where consistent with collective capacity, to any committee, firm, partnership, club, organization, association, corporation or other combination of individuals.

"Candidate" shall apply to any person whose name is printed on an official ballot for public office, or whose name is expected to be or has been presented for public office, with his consent, for nomination or election.

"Political agent" shall apply to any person who, upon request or under agreement, receives or disburses money in behalf of a candidate.

"Political committee" shall apply to every combination of two or more persons who shall aid or promote the success or defeat of a candidate, or a political party or principle, and the provisions of law relating thereto shall apply to any firm or partnership, to any corporation, and to any club, organization, association, or other combination of persons, whether incorporated or not, with similar purposes, whether primary or incidental.

"Public office" shall apply to any national, state, county, or city office to which a salary attaches and which is filled by the voters, as well as to the office of presidential elector, United States senator, or presiding officer of either branch of the legislature.

"Give," "provide," "expend," "contribute," "receive," "ask," "solicit," and like terms, with their corresponding nouns, shall apply to money, its equivalent, or any other valuable thing; shall include the promise, advance

deposit, borrowing, or loan thereof, and shall cover all or any part of a transaction, whether it be made directly or indirectly.

None of the provisions of this act shall be construed as relating to the rendering of services by speakers, writers, publishers, or others, for which no compensation is asked or given; nor to prohibit expenditure by committees of political parties or organizations for public speakers, music, halls, lights, literature, advertising, office rent, printing, postage, clerk hire, challengers or watchers at the polls, traveling expenses, telegraphing or telephoning, or making of poll lists.

History: En. Sec. 10, Init. Act, Nov. 1912; re-en. Sec. 10775, R. C. M. 1921.

94-1430. (10776) Statement by candidate as to moneys expended—filing after election—penalty. Every candidate for nomination or election to public office, including candidates for the office of senator of the United States, shall, within fifteen days after the election at which he was a candidate. file with the secretary of state if a candidate for senator of the United States, representative in Congress, or for any state or district office in a district composed of one or more counties, or for members of the legislative assembly from a district composed of more than one county, but with the county clerk for legislative districts composed of not more than one county, and for county and precinct offices, and with the city clerk, auditor, or recorder of the town or city in which he resides, if he was a candidate for a town, city, or ward office, an itemized sworn statement setting forth in detail all the moneys contributed, expended, or promised by him to aid and promote his nomination or election, or both, as the case may be, and for the election of his party candidates, and all existing unfulfilled promises of every character, and all liabilities remaining uncanceled and in force at the time such statement is made, whether such expenditures, promises, and liabilities were made or incurred before, during, or after such election. If no money or other valuable thing was given, paid, expended, contributed, or promised, and no unfulfilled liabilities were incurred by a candidate for public office to aid or promote his nomination or election, or the election of his party candidates, he shall file a statement to that effect within fifteen days after the election at which he was a candidate. Any candidate who shall fail to file such a statement shall be fined twenty-five dollars for every day on which he was in default, unless he shall be excused by the court. Fifteen days after any such election the secretary of state, or county clerk, city clerk, auditor, or recorder, as the case may be, shall notify the county attorney of any failure to file such a statement on the part of any candidate, and within ten days thereafter such prosecuting officer shall proceed to prosecute said candidate for such offense.

History: En. Sec. 11, Init. Act, Nov. 1912; re-en. Sec. 10776, R. C. M. 1921.

Collateral References

Elections \$231. 29 C.J.S. Elections § 216 (2). 26 Am. Jur. 2d 113, Elections, § 289. Construction and application of statute regarding statement by candidate as to his expenses, or his interest in, or the financial value of publicity through, newspapers or other publicity sources. 103 ALR 1424.

94-1431. (10777) Accounts of expenditures by political committees and other persons—statement. (1) Every political committee shall have a

treasurer, who is a voter, and shall cause him to keep detailed accounts of all its receipts, payments, and liabilities. Similar accounts shall be kept by every person, who in the aggregate receives or expends money or incurs liabilities to the amount of more than fifty dollars (\$50) for political purposes, and by every political agent and candidate. Such accounts shall cover all transactions in any way affecting or connected with the political canvass, campaign, nomination, or election concerned.

- (2) Every person receiving or expending money or incurring liability by authority or in behalf of or to promote the success or defeat of such committee, agent, candidate, or other person or political party or organization, shall, on demand, and in any event within fourteen (14) days after such receipt, expenditure, or incurrence of liability, give such treasurer, agent, candidate, or other person on whose behalf such expense or liability was incurred a detailed verified account thereof. Every payment shall be accounted for by a receipted bill stating the particulars of expense. Every voucher, receipt, and verified account hereby required shall be a part of the accounts and files of such treasurer, agent, candidate, or other person, and shall be preserved for six (6) months after the election to which it refers.
- (3) Any person not a candidate for any office or nomination who expends money or value to an amount greater than fifty dollars (\$50) in any campaign for nomination or election, to aid in the election or defeat of any candidate or candidates, or party ticket, or measure before the people, shall, within ten (10) days after the election in which said money or value was expended, file with the secretary of state in the case of a measure voted upon by the people, or of state or district offices for districts composed of one (1) or more counties, or with the county clerk for county offices, and with the city clerk, auditor, or recorder for municipal offices, a verified itemized statement of such receipts and expenditures for every sum paid in excess of five dollars (\$5), and shall at the same time deliver to the candidate or treasurer of the political organization whose success or defeat he has sought to promote, a duplicate of such statement and a copy of such receipts.
- (4) The books of account of every treasurer of any political party, committee, or organization, during an election campaign, shall be open at all reasonable office hours to the inspection of the treasurer and chairman of any opposing political party or organization for the same electoral district; and his right of inspection may be enforced by writ of mandamus by any court of competent jurisdiction.

History: En. Sec. 12, Init. Act, Nov. 1912; re-en. Sec. 10777, R. C. M. 1921; amd. Sec. 1, Ch. 41, L. 1969.

94-1432. (10778) Copies of act to be furnished certain public officers and candidates. The secretary of state shall, at the expense of the state, furnish to the county clerk, and to the city and town clerks, auditors, and recorders, copies of this act as a part of the election laws. In the filing of a nomination petition or certificate of nomination, the secretary of state, in the case of state and district offices for districts composed of one or more counties, and county clerks for county offices, and the city and town clerks, auditors, or recorders for municipal offices, shall transmit to the

several candidates, and to the treasurers of political committees, and to political agents, as far as they may be known to such officer, copies of this act, and also to any other person required to file a statement such copies shall be furnished upon application therefor. Upon his own information, or at the written request of any voter, said secretary of state shall transmit to any other person believed by him or averred to be a candidate, or who may otherwise be required to make a statement, a copy of this act.

History: En. Sec. 13, Init. Act, Nov. 1912; re-en. Sec. 10778, R. C. M. 1921.

94-1433. (10779) Inspection of accounts — complaints — statement of receipts. The several officers with whom statements are required to be filed shall inspect all statements of accounts and expenses relating to nominations and elections filed with them within ten days after the same are filed; and if, upon examination of the official ballot, it appears that any person has failed to file a statement as required by law, or if it appears to any such officer that the statement filed with him does not conform to law. or upon complaint in writing by a candidate or by a voter that a statement filed does not conform to law or to the truth, or that any person has failed to file a statement which he is by law required to file, said officer shall forthwith in writing notify the delinquent person. Every such complaint filed by a citizen or candidate shall state in detail the grounds of objection, shall be sworn to by the complainant, and shall be filed with the officer within sixty days after the filing of the statement or amended statement. Upon the written request of a candidate or any voter, filed within sixteen days after any convention, primary, or nominating election, said secretary of state, county clerk, city or town clerk, auditor, or recorder, as the case may be, shall demand from any specified person or candidate a statement of all his receipts, and from whom received, disbursements and liabilities in connection with or in any way relating to the nomination or election concerned, whether it is an office to which a salary or compensation is attached or not, and said person shall thereupon be required to file such statement and to comply with all the provisions relating to statements herein contained. Whoever makes a statement required by this act shall make oath attached thereto that it is in all respects correct, complete, and true, to the best of his knowledge and belief, and said verification shall be in substantially the form herein provided.

History: En. Sec. 14, Init. Act, Nov. 1912; re-en. Sec. 10779, R. C. M. 1921.

94-1434. (10780) Prosecutions for failure to file statement. Upon the failure of any person to file a statement within ten days after receiving notice, under the preceding section, or if any statement filed as above discloses any violation of any provision of this act relating to corrupt practices in elections, or in any other provision of the election laws, the secretary of state, the county clerk, or the city clerk, auditor, or recorder, as the case may be, shall forthwith notify the county attorney of the county where said violation occurred, and shall furnish him with copies of all papers relating thereto, and said county attorney shall, within sixty days there-

after, examine every such case, and if the evidence seems to him to be sufficient under the provisions of this act, he shall, in the name of the state, forthwith institute such civil or criminal proceedings as may be appropriate to the facts.

History: En. Sec. 15, Init. Act, Nov. 1912; re-en. Sec. 10780, R. C. M. 1921.

94-1435. (10781) Jurisdiction—court may compel filing of statements. The district court of the county in which any statement of accounts and expenses relating to nominations and elections should be filed, unless herein otherwise provided, shall have exclusive original jurisdiction of all violations of this act, and may compel any person who fails to file such a statement as required by this act, or who files a statement which does not conform to the provisions of this act in respect to its truth, sufficiency in detail, or otherwise, to file a sufficient statement, upon the application of the attorney general or of the county attorney, or the petition of a candidate or of any voter. Such petition shall be filed in the district court within sixty days after such election if the statement was filed within the fifteen days required, but such a petition may be filed within thirty days after any payment not included in the statement so filed.

History: En. Sec. 16, Init. Act, Nov. 1912; re-en. Sec. 10781, R. C. M. 1921.

94-1436. (10782) Record of statements—copies. All statements shall be preserved for six months after the election to which they relate, and shall be public records subject to public inspection, and it shall be the duty of the officers having custody of the same to give certified copies thereof in like manner as of other public records.

History: En. Sec. 17, Init. Act, Nov. 1912; re-en. Sec. 10782, R. C. M. 1921; amd. Sec. 1, Ch. 41, L. 1943.

94-1437. (10783) Payments in name of undisclosed principal. No person shall make a payment of his own money or of another persons money to any other person in connection with a nomination or election in any other name than that of the person who in truth supplies such money; nor shall any person knowingly receive such payment, or enter, or cause the same to be entered, in his accounts or records in another name than that of the person by whom it was actually furnished; provided, if the money be received from the treasurer of any political organization, it shall be sufficient to enter the same as received from said treasurer.

History: En. Sec. 18, Init. Act, Nov. 1912; re-en. Sec. 10783, R. C. M. 1921.

94-1438. (10784) Promise to procure appointment or election. No person shall, in order to aid or promote his nomination or election, directly or indirectly, himself or through any other person, promise to appoint another person, or promise to secure or aid in securing the appointment, nomination, or election of another person to any public or private position or employment, or to any position of honor, trust, or emolument, except that he may publicly announce or define what is his choice or purpose in relation to any election in which he may be called to take part, if elected, and if he

is a candidate for nomination or election as a member of the legislative assembly, he may pledge himself to vote for the people's choice for United States senator, or state what his action will be on such vote.

History: En. Sec. 19, Init. Act, Nov. Collateral References 1912; re-en. Sec. 10784, R. C. M. 1921. 26 Am. Jur. 2d 108, Elections, § 283.

94-1439. (10785) Public officer or employee not to contribute funds. No holder of a public position or office, other than an office filled by the voters, shall pay or contribute to aid or promote the nomination or election of any other person to public office. No person shall invite, demand, or accept payment or contribution from such holder of a public position or office for campaign purposes.

History: En. Sec. 20, Init. Act, Nov. 1912; re-en. Sec. 10785, R. C. M. 1921.

Collateral References
Elections©=317.
29 C.J.S. Elections § 334 (1).
26 Am. Jur. 2d 193, Elections, § 381.

94-1440. (10786) Certain public officers prohibited from acting as delegates or members of political committee. No holder of a public position, other than an office filled by the voters, shall be a delegate to a convention for the election district that elects the officer or board under whom he directly or indirectly holds such position, nor shall he be a member of a political committee for such district.

History: En. Sec. 21, Init. Act, Nov. 1912; re-en. Sec. 10786, R. C. M. 1921.

When Mandamus Lies To Compel Magistrate's Disposal

Held, on application for writ of mandamus to compel a justice of the peace to dispose of an accusation brought under this section, that the writ will issue commanding the justice to take action by

either issuing a warrant of arrest or dismissing the complaint where two weeks expired before examination of the accuser and two months in examining six witnesses to ascertain whether a violation was probable or not, but it will not issue to control his discretion, i. e., to issue a warrant of arrest. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

94-1441. (10787) Transfer of convention credential. No person shall invite, offer, or effect the transfer of any convention credential in return for any payment of money or other valuable thing.

History: En. Sec. 22, Init. Act, Nov. 1912; re-en. Sec. 10787, R. C. M. 1921.

94-1442. (10788) Inducing person to be or not to be candidate. No person shall pay, or promise to reward another, in any manner or form, for the purpose of inducing him to be or refrain from or cease being a candidate, and no person shall solicit any payment, promise, or reward from another for such purpose.

History: En. Sec. 23, Init. Act, Nov. 1912; re-en. Sec. 10788, R. C. M. 1921.

Collateral References
Elections©=230.
29 C.J.S. Elections § 218.

94-1443. (10789) What demands or requests shall not be made of candidates. No person shall demand, solicit, ask, or invite any payment or contribution for any religious, political, charitable, or other cause or organization supposed to be primarily or principally for the public good, from a person who seeks to be or has been nominated or elected to any office; and no

such candidate or elected person shall make any such payment or contribution if it shall be demanded or asked during the time he is a candidate for nomination or election to or an incumbent of any office. No payment or contribution for any purpose shall be made a condition precedent to the putting of a name on any caucus or convention ballot or nomination paper or petition, or to the performance of any duty imposed by law on a political committee. No person shall demand, solicit, ask, or invite any candidate to subscribe to the support of any club or organization, to buy tickets to any entertainment or ball, or to subscribe for or pay for space in any book, program, periodical, or other publication; if any candidate shall make any such payment or contribution with apparent hope or intent to influence the result of the election, he shall be guilty of a corrupt practice; but this section shall not apply to the soliciting of any business advertisement for insertion in a periodical in which such candidate was regularly advertising prior to his candidacy, nor to ordinary business advertising, nor to his regular payment to any organization, religious, charitable, or otherwise, of which he may have been a member, or to which he may have been a contributor, for more than six months before his candidacy, nor to ordinary contributions at church services.

History: En. Sec. 24, Init. Act, Nov. 1912; re-en. Sec. 10789, R. C. M. 1921.

Collateral References

Elections 231. 29 C.J.S. Elections § 216.

26 Am. Jur. 2d 111 et seq., Elections, § 287 et seq.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

Construction of statute prohibiting solicitation or acceptance of contributions or subscriptions by public officer or employee. 85 ALR 1146.

94-1444. (10790) Contributions from corporations, public utilities and others. No corporation, and no person, trustee, or trustees owning or holding the majority of the stock of a corporation carrying on the business of a bank, savings bank, co-operative bank, trust, trustee, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery or crematory company, or any company having the right to take or condemn land, or to exercise franchises in public ways granted by the state or by any county, city, or town, shall pay or contribute in order to aid, promote, or prevent the nomination or election of any person, or in order to aid or promote the interests, success, or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or such holders of a majority of such stock.

History: En. Sec. 25, Init. Act, Nov. 1912; re-en. Sec. 10790, R. C. M. 1921.

Collateral References

Elections 231. 29 C.J.S. Elections § 216.

26 Am. Jur. 2d 193, Elections, § 381.

Construction and application of provisions of Corrupt Practices Act regarding contributions by corporations. 125 ALR

94-1445. (10791) Treating. Any person or candidate who shall either by himself or by any other person, either before or after an election, or while such person or candidate is seeking a nomination or election, directly or indirectly, give or provide, or pay, wholly or in part, the expenses of giving or providing any meat or drink, or other entertainment or provision, clothing, liquors, eigars, or tobacco, to or for any person for the purpose of or with intent or hope to influence that person, or any other person, to give or refrain from giving his vote at such election to or for any candidate or political party ticket, or measure before the people, or on account of such persons, or any other person, having voted or refrained from voting for any candidate or the candidates of any political party or organization or measure before the people, or being about to vote or refrain from voting at such election, shall be guilty of treating. Every elector who accepts or takes any such meat, drink, entertainment, provision, clothing, liquors, cigars, or tobacco, shall also be guilty of treating; and such acceptance shall be a ground of challenge to his vote and of rejecting his vote on a contest.

History: En. Sec. 26, Init. Act, Nov. 1912; re-en. Sec. 10791, R. C. M. 1921.

Collateral References

26 Am. Jur. 2d 110, Elections, § 285.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

(10792) Challenging voters—procedure. Whenever any person's right to vote shall be challenged, and he has taken the oath prescribed by the statutes, and if it is at a nominating election, then it shall be the duty of the clerks of election to write in the pollbooks at the end of such person's name the words "challenged and sworn," with the name of the challenger. Thereupon the chairman of the board of judges shall write upon the back of the ballot offered by such challenged voter the number of his ballot, in order that the same may be identified in any future contest of the results of the election, and be cast out if it shall appear to the court to have been for any reason wrongfully or illegally voted for any candidate or on any question. And such marking of the name of such challenged voter, nor the testimony of any judge or clerk of election in reference thereto, or in reference to the manner in which said challenged person voted, if said testimony shall be given in the course of any contest, investigation, or trial wherein the legality of the vote of such person is questioned for any reason, shall not be deemed a violation of section 94-1407.

History: En. Sec. 27, Init. Act, Nov. 1912; re-en. Sec. 10792, R. C. M. 1921.

Cross-Reference

Challenges, sec. 23-3611 et seq.

Collateral References

Elections 223.

29 C.J.S. Elections § 209. 26 Am. Jur. 2d 67, Elections, § 237.

94-1447. (10793) Coercion or undue influence of voters. Every person who shall, directly or indirectly, by himself or any other person in his behalf, make use of or threaten to make use of any force, coercion, violence, restraint, or undue influence, or inflict or threaten to inflict, by himself or any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting for any candidate, or the ticket of any political party, or any measure before the people, or any person who, being a minister, preacher, or priest, or any officer of any church, religious or other corporation or organization, otherwise than by public speech or print, shall urge, persuade, or command any voter to vote or refrain from voting for or against any candidate or political party ticket or measure submitted to the people, for or on account of his religious duty, or the interest of any corporation, church, or other organization, or who shall, by abduction, duress, or any fraudulent contrivance, impede or prevent the free exercise of the franchise by any voter at any election, or shall thereby compel, induce, or prevail upon any elector to give or to refrain from giving his vote at any election, shall be guilty of undue influence, and shall be punished as for a corrupt practice.

History: En. Sec. 28, Init. Act, Nov. 1912; re-en. Sec. 10793, R. C. M. 1921.

Collateral References Elections ≈ 234, 320. 29 C.J.S. Elections §§ 215, 220, 333. 26 Am. Jur. 2d 110, Elections, § 286.

94-1448. (10794) Bets or wagers on election results. Any candidate who, before or during any election campaign, makes any bet or wager of anything of pecuniary value, or in any manner becomes a party to any such bet or wager on the result of the election in his electoral district, or in any part thereof, or on any event or contingency relating to any pending election, or who provides money or other valuables to be used by any person in betting or wagering upon the results of any impending election, shall be guilty of a corrupt practice. Any person who, for the purpose of influencing the result of any election, makes any bet or wager of anything of pecuniary value on the result of such election in his electoral district, or any part thereof, or of any pending election, or on any event or contingency relating thereto, shall be guilty of a corrupt practice, and in addition thereto any such act shall be ground of challenge against his right to vote.

History: En. Sec. 29, Init. Act, Nov. 1912; re-en. Sec. 10794, R. C. M. 1921.

Collateral References
Elections 228.
29 C.J.S. Elections § 215.
26 Am. Jur. 2d 189, Elections, § 378.

94-1449. (10795) Personating another elector—penalty. Any person shall be deemed guilty of the offense of personation who, at any election, applies for a ballot in the name of some other person, whether it be that of a person living or dead, or of a fictitious person, or who, having voted once at an election, applies at the same election for a ballot in his own name; and on conviction thereof such person shall be punished by imprisonment in the penitentiary at hard labor for not less than one nor more than three years.

History: En. Sec. 30, Init. Act, Nov. 1912; re-en. Sec. 10795, R. C. M. 1921.

Cross-Reference

List of persons voting, sec. 23-3610.

Collateral References
Elections \$\iiins 232.
29 C.J.S. Elections \{ 217.

26 Am. Jur. 2d 187, Elections, § 375.

94-1450. (10796) Corrupt practice, what constitutes. Any person shall be guilty of a corrupt practice, within the meaning of this act, if he expends any money for election purposes contrary to the provisions of any statute of this state, or if he is guilty of treating, undue influence, personation, the giving or promising to give, or offer of any money or valuable thing to any elector, with intent to induce such elector to vote for or to refrain

from voting for any candidate for public office, or the ticket of any political party or organization, or any measure submitted to the people, at any election, or to register or refrain from registering as a voter at any state, district, county, city, town, village, or school district election for public offices or on public measures. Such corrupt practice shall be deemed to be prevalent when instances thereof occur in different election districts similar in character and sufficient in number to convince the court before which any case involving the same may be tried that they were general and common, or were pursuant to a general scheme or plan.

History: En. Sec. 31, Init. Act, Nov. 1912; re-en. Sec. 10796, R. C. M. 1921.

Constitutionality

Held, that the district court has jurisdiction to entertain a proceeding for removal of state officer for violation of the to 94-1460, 94-1462 to 94-1474) to determine the validity of his election, as against contention that the act contravenes the provisions of article V, section 17, relative to impeachment, and article III section 10 relative to the right of III, section 10, relative to the right of free speech. Tipton v. Sands, 103 M 1, 9, 10, 60 P 2d 662.

Articles Held of Value

Finding of the trial court that "handy menders" containing needles and thread bearing the name of a candidate for office charged with violation of the Corrupt Practices Act (sections 94-1427 to 94-1460, 94-1462 to 94-1474) as well as pencils, were articles of value within the meaning of this section upheld. Large quantities of beer by the bottle and keg, cigarettes, snuff, and smoking tobacco by the package, chewing tobacco by the plug, purchased and distributed by defendant or his agents, held to sustain the finding. Kommers v. Palagi, 111 M 293, 309, 108 P 2d 208.

Offering To Serve at Less Salary

The general rule is that offers made and statements published by a candidate for public office that, if elected, he will serve for a smaller salary than that fixed by law, are violative of the corrupt practices acts and constitute bribery under the common law. Tipton v. Sands, 103 M 1, 11, 60 P 2d 662.

Collateral References

Elections 228 et seq. 29 C.J.S. Elections § 216. 26 Am. Jur. 2d 111 et seq., Elections, § 287 et seq.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402. Constitutionality of corrupt practices

acts, 69 ALR 377.

Construction of statute prohibiting solicitation or acceptance of contributions or subscriptions by public officer or employee. 85 ALR 1146.

Statements by candidates regarding salaries or fees of office as violation of corrupt practices acts or bribery. 106 ALR 493.

Construction and application of provisions of Corrupt Practices Act regarding contributions by corporations. 125 ALR

94-1451. (10797) Compensating voter for loss of time—badges and insignia. It shall be unlawful for any person to pay another for any loss or damage due to attendance at the polls, or in registering, or for the expense of transportation to or from the polls. No person shall pay for personal service to be performed on the day of a caucus, primary, convention, or any election, for any purpose connected therewith, tending in any way, directly or indirectly, to affect the result thereof, except for the hiring of persons whose sole duty is to act as challengers and watch the count of official ballots. No person shall buy, sell, give, or provide any political badge, button, or other insignia to be worn at or about the polls on the day of any election, and no such political badge, button, or other insignia shall be worn at or about the polls on any election day.

History: En. Sec. 32, Init. Act, Nov. 1912; re-en. Sec. 10797, R. C. M. 1921.

94-1452. (10798) Publications in newspapers and periodicals. No publisher of a newspaper or other periodical shall insert, either in its advertising or reading columns, any paid matter which is designed or tends to aid, injure, or defeat any candidate or any political party or organization, or measure before the people, unless it is stated therein that it is a paid advertisement, the name of the chairman or secretary, or the names of the other officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street number thereof, if any, appear in such advertisement in the nature of a signature. No person shall pay the owner, editor, publisher, or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment. Any person who shall violate any of the provisions of this section shall be punished as for a corrupt practice.

History: En. Sec. 33, Init. Act, Nov. 1912; re-en. Sec. 10798, R. C. M. 1921.

Collateral References Elections 5231, 317. 29 C.J.S. Elections § 216, 329, 356. 26 Am. Jur. 2d 191, Elections, § 380.

94-1453. (10799) Solicitation of votes on election day. It shall be unlawful for any person at any place on the day of any election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote for or refrain from voting for any candidate, or the candidates or ticket of any political party or organization, or any measure submitted to the people, and upon conviction thereof he shall be punished by fine of not less than five dollars nor more than one hundred dollars for the first offense, and for the second and each subsequent offense occurring on the same or different election days, he shall be punished by fine as aforesaid, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

History: En. Sec. 34, Init. Act, Nov. 1912; re-en. Sec. 10799, R. C. M. 1921.

Cross-Reference

Electioneering, when prohibited, secs. 23-3605, 94-1413.

Collateral References

Elections ≥231, 317. 29 C.J.S. Elections §§ 216, 329, 356. 26 Am. Jur. 2d, Elections, p. 111, § 287; p. 186, § 374.

94-1454. (10800) Political criminal libel. It shall be unlawful to write, print, or circulate through the mails or otherwise any letter, circular, bill, placard, or poster relating to any election or to any candidate at any election, unless the same shall bear on its face the name and address of the author, and of the printer and publisher thereof; and any person writing, printing, publishing, circulating, posting, or causing to be written, printed, circulated, posted, or published any such letter, bill, placard, circular, or poster as aforesaid, which fails to bear on its face the name and address of the author and of the printer or publisher, shall be guilty of an illegal practice, and shall on conviction thereof be punished by a fine of not less than ten dollars nor more than one thousand dollars. If any letter, circular, poster, bill, publication, or placard shall contain any false statement or charges reflecting on any candidate's character, morality, or integrity, the author thereof, and every person printing or knowingly assisting in the

circulation, shall be guilty of political criminal libel, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one nor more than three years. If the person charged with such crime shall prove on his trial that he had reasonable ground to believe such charge was true, and did believe it was true, and that he was not actuated by malice in making such publication, it shall be a sufficient defense to such charge. But in that event, and as a part of such defense, the author and the printer or publisher or other person charged with such crime shall also prove that, at least fifteen days before such letter, circular, poster, bill, or placard containing such false statement or statements was printed or circulated, he or they caused to be served personally and in person upon the candidate to whom it relates a copy thereof in writing, and calling his attention particularly to the charges contained therein, and that, before printing, publishing, or circulating such charges, he received and read any denial, defense, or explanation, if any, made or offered to him in writing by the accused candidate within ten days after the service of such charge upon the accused person.

History: En. Sec. 35, Init. Act, Nov. 1912; re-en. Sec. 10800, R. C. M. 1921.

Compiler's Note

This section may be partially superseded by sec. 94-1475.

Collateral References
Libel and Slander 20.

53 C.J.S. Libel and Slander § 28. 26 Am. Jur. 2d 191, Elections, § 380.

Libel and slander: defamation of one in his character as a political leader or "boss." 55 ALR 854.

Constitutionality and construction of statutes relating to charges and attacks on candidates for nomination or election to public office, 96 ALR 582.

94-1455. (10801) Filing of statement of expenses by candidate. The name of a candidate chosen at a primary nominating election, or otherwise, shall not be printed on the official ballot for the ensuing election, unless there has been filed by or on behalf of said candidate the statements of accounts and expenses relating to nominations required by this act, as well as a statement by his political agent and by his political committee or committees in his behalf, if his statement discloses the existence of such agent, committee, or committees. The officer or board entrusted by law with the preparation of the official ballots for any election shall, as far as practicable, warn candidates of the danger of the omission of their names by reason of this provision, but delay in making any such statement beyond the time prescribed shall not preclude its acceptance or prevent the insertion of the name on the ballot, if there is reasonable time therefor after the receipt of such statements. Any such vacancy on the ballot shall be filled by the proper committee of his political party in the manner authorized by law, but not by the use of the name of the candidate who failed to file such statements. No person shall receive a certificate of election until he shall have filed the statements required by this act.

History: En. Sec. 36, Init. Act, Nov. 1912; re-en. Sec. 10801, R. C. M. 1921.

Collateral References

Elections 231.
29 C.J.S. Elections § 216 (2).
26 Am. Jur. 2d 113, Elections, § 289.

Construction and application of statute regarding statement by candidate as to his expenses, or his interest in, or the financial value of publicity through, newspapers or other publicity sources. 103 ALR

94-1456. (10802) Inducement to accept or decline nomination. It shall be unlawful for any person to accept, receive, or pay money or any valuable consideration for becoming or for refraining from becoming a candidate for nomination or election, or by himself or in combination with any other person or persons to become a candidate for the purpose of defeating the nomination or election of any other person, and not with a bona fide intent to obtain the office. Upon complaint made to any district court, if the judge shall be convinced that any person has sought the nomination, or seeks to have his name presented to the voters as a candidate for nomination by any political party, for any mercenary or venal consideration or motive, and that his candidacy for the nomination is not in good faith, the judge shall forthwith issue his writ of injunction restraining the officer or officers whose duty it is to prepare the official ballots for such nominating election from placing the name of such person thereon as a candidate for nomination to any office. In addition thereto, the court shall direct the county attorney to institute criminal proceedings against such person or persons for corrupt practice, and upon conviction thereof he and any person or persons combining with him shall be punished by a fine of not more than one thousand dollars, or imprisonment in the county jail for not more than one year.

History: En. Sec. 37, Init. Act, Nov. Cross-Reference 1912; re-en. Sec. 10802, R. C. M. 1921. Declining nomination, sec. 23-3321.

(10803) Forfeiture of nomination or office for violation of law. when not worked. Where, upon the trial of any action or proceeding under the provisions of this act for the contest of the right of any person declared nominated or elected to any office, or to annul or set aside such nomination or election, or to remove a person from his office, it appears from the evidence that the offense complained of was not committed by the candidate, or with his knowledge or consent, or was committed without his sanction or connivance, and that all reasonable means for preventing the commission of such offense at such election were taken by and on behalf of the candidate, or that the offense or offenses complained of were trivial, unimportant, and limited in character, and that in all other respects his participation in the election was free from such offenses or illegal acts, or that any act or omission of the candidate arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith, and under the circumstances it seems to the court to be unjust that the said candidate shall forfeit his nomination or office, or be deprived of any office of which he is the incumbent, then the nomination or election of such candidate shall not by reason of such offense or omission complained of be void, nor shall the candidate be removed from or deprived of his office.

History: En. Sec. 38, Init. Act, Nov. 1912; re-en. Sec. 10803, R. C. M. 1921.

Collateral References
Elections 231; Officers 27, 64.

29 C.J.S. Elections § 216; 67 C.J.S. Officers §§ 25, 57.

94-1458. (10804) Punishment for violation of act. If, upon the trial of any action or proceeding under the provisions of this act, for the contesting

of the right of any person declared to be nominated to an office, or elected to an office, or to annul and set aside such election, or to remove any person from his office, it shall appear that such person was guilty of any corrupt practice, illegal act, or undue influence, in or about such nomination or election, he shall be punished by being deprived of the nomination or office, as the case may be, and the vacancy therein shall be filled in the manner provided by law. The only exception to this judgment shall be that provided in the preceding section of this act. Such judgment shall not prevent the candidate or officer from being proceeded against by indictment or criminal information for any such act or acts.

History: En. Sec. 39, Init. Act, Nov. 1912; re-en. Sec. 10804, R. C. M. 1921.

Not a Criminal Proceeding Requiring Trial by Jury

Though this act speaks of the defendant as the "guilty" person and his "punishment," the proceeding is not criminal in nature but is a special one exempt from

the constitutional requirement of trial by jury. The purpose of the act is to secure the purity of elections under section 9, article IV of the constitution and contest the right of one elected to office because of a violation, and effect his removal. State ex rel. Palagi v. Regan, 113 M 343, 353, 126 P 2d 818.

94-1459. (10805) Time for commencing contest. Any action to contest the right of any person declared elected to an office, or to annul and set aside such election, or to remove from or deprive any person of an office of which he is the incumbent, for any offense mentioned in this act, must, unless a different time be stated, be commenced within forty days after the return day of the election at which such offense was committed, unless the ground of the action or proceeding is for the illegal payment of money or other valuable thing subsequent to the filing of the statements prescribed by this act, in which case the action or proceeding may be commenced within forty days after the discovery by the complainant of such illegal payment. A contest of the nomination or office of governor or representative or senator in congress must be commenced within twenty days after the declaration of the result of the election, but this shall not be construed to apply to any contest before the legislative assembly.

History: En. Sec. 40, Init. Act, Nov. 1912; re-en. Sec. 10805, R. C. M. 1921.

Cross-Reference

Recounts, sec. 23-4101 et seq.

No Application to County Commissioner Election Contest Based on Two-year Residence Requirement

Held, that this section has no application to an election contest involving the office of county commissioner based on the ground that contestee had not resided in the commissioner's district for two years prior to becoming a candidate, the word "offense" as used in the act being synonymous with crime, and no element of crime being involved in such a contest. Snyder v. Boulware, 109 M 427, 430, 96 P 2d 913.

Collateral References

Elections 278.
29 C.J.S. Elections § 258.
26 Am. Jur. 2d 148, Elections, § 326.

94-1460. (10806) Court having jurisdiction of proceedings. An application for filing a statement, payment of a claim, or correction of an error or false recital in a statement filed, or an action or proceeding to annul and set aside the election of any person declared elected to an office, or to remove or deprive any person of his office for an offense mentioned in this act, or any petition to excuse any person or candidate in accordance with the power of the court to excuse as provided in section 94-1457, must be made or filed

in the district court of the county in which the certificate of his nomination as a candidate for the office to which he is declared nominated or elected is filed, or in which the incumbent resides.

History: En. Sec. 41, Init. Act, Nov. 1912; re-en. Sec. 10806, R. C. M. 1921.

Collateral References Elections 231, 277. 29 C.J.S. Elections §§ 216, 253. 26 Am. Jur. 2d 150, Elections, §§ 328,

(10807) Repealed—Chapter 50, Laws of 1947. 94-1461.

(10808) Duty of county attorney on violation of act—penalty for neglect or refusal to act. If any county attorney shall be notified by any officer or other person of any violation of any of the provisions of this act within his jurisdiction, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable ground for instituting a prosecution, it shall be the duty of such county attorney to file a complaint or information in writing, before a court of competent jurisdiction, charging the accused person with such offense; if any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit his office. It shall be the duty of the county attorney, under penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of this act, the penalty of which is fine or imprisonment, or both, or removal from office.

History: En. Sec. 43, Init. Act, Nov. 1912; re-en. Sec. 10808, R. C. M. 1921.

Collateral References

District and Prosecuting Attorneys 2 (5), 8. 27 C.J.S. District and Prosecuting At-

torneys §§ 6, 7, 9, 10, 14.

(10809) Declaration of result of election after rejection of illegal votes. If, in any case of a contest on the ground of illegal votes, it appears that another person than the one returned has the highest number of legal votes, after the illegal votes have been eliminated, the court must declare such person nominated or elected, as the case may be.

History: En. Sec. 44, Init. Act, Nov. 1912; re-en. Sec. 10809, R. C. M. 1921.

Collateral References

Elections 303. 29 C.J.S. Elections §§ 302-305, 307. 26 Am. Jur. 2d 173, Elections, § 357.

- (10810) Grounds for contest of nomination or office. Any elector of the state, or of any political or municipal division thereof, may contest the right of any person to any nomination or office for which such elector has the right to vote, for any of the following causes:
- On the ground of deliberate, serious, and material violation of any of the provisions of this act, or of any other provision of the law relating to nominations or elections.
- When the person whose right was contested was not, at the time of the election, eligible to such office.
- 3. On account of illegal votes or an erroneous or fraudulent count or canvass of votes.

History: En. Sec. 45, Init. Act, Nov. 1912; re-en. Sec. 10810, R. C. M. 1921.

Operation and Effect

This section permits a nomination as well as an election to be made the subject of contest, and in this respect extends the law upon the subject. This addition was doubtless made in anticipation that the general primary election law would be adopted. Cadle v. Town of Baker, 51 M 176, 181, 149 P 960.

Proper Procedure Where Contestee Has Not Assumed Office

Where an election contest involving the office of county commissioner was commenced before the contestee had assumed office, he may not be said to have usurped, intruded into, unlawfully held or exercised the office, within the meaning of section 93-6401, prescribing when quo warranto may be brought, and the action based on the ground that the contestee

was ineligible was properly brought under this section. Snyder v. Boulware, 109 M 427, 431, 96 P 2d 913.

Who Qualified To Institute Contest

Under this section, one who had been a resident of a county for 25 years, registered as a qualified elector in a certain precinct, in a county commissioner district, and who voted in such precinct, was qualified to bring an action contesting the right of a commissioner elected in such district to hold the office to which he was elected, on the ground that he had not been a resident in the district for two years prior to the time he became a candidate for the office (section 4, article XVI of the constitution). Snyder v. Boulware, 109 M 427, 430, 96 P 2d 913.

Collateral References

Elections \$\sim 271.
29 C.J.S. Elections \$\sim 249, 250.
26 Am. Jur. 2d 144, Elections, \sim 321.

94-1465. (10811) Nomination or election not to be vacated, when. Nothing in the third ground of contest specified in the preceding section is to be so construed as to authorize a nomination or election to be set aside on account of illegal votes, unless it appear, either that the candidate or nominee whose right is contested had knowledge of or connived at such illegal votes, or that the number of illegal votes given to the person whose right to the nomination or office is contested, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same nomination or office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

History: En. Sec. 46, Init. Act, Nov. 1912; re-en. Sec. 10811, R. C. M. 1921.

94-1466. (10812) Reception of illegal votes, allegations and evidence. When the reception of illegal votes is alleged as a cause of contest, it shall be sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose nomination or election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony shall be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial. This provision shall not prevent the contestant from offering evidence of illegal votes not included in such statement, if he did not know and by reasonable diligence was unable to learn of such additional illegal votes, and by whom they were given, before delivering such written list.

History: En. Sec. 47, Init. Act, Nov. 1912; re-en. Sec. 10812, R. C. M. 1921.

Collateral References

Elections 285 (3), (4), 293 (1).

29 C.J.S. Elections §§ 268, 276, 278, 280, 282.

26 Am. Jur. 2d, Elections, p. 155, § 336; p. 163, § 344.

94-1467. (10813) Contents of contest petition — amendment — bond costs—citation—precedence. Any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose election is contested, and the grounds of the contest, and shall not thereafter be amended, except by leave of the court. Before any proceeding thereon the petitioner shall give bond to the state in such sum as the court may order, not exceeding two thousand dollars, with not less than two sureties, who shall justify in the manner required of sureties on bail bonds, conditioned to pay all costs, disbursements, and attorney's fees that may be awarded against him if he shall not prevail. If the petitioner prevails, he may recover his costs, disbursements, and reasonable attorney's fees against the contestee. But costs, disbursements, and attorney's fees, in all such cases, shall be in the discretion of the court, and in case judgment is rendered against the petitioner, it shall also be rendered against the sureties on the bond. On the filing of any such petition, the clerk shall immediately notify the judge of the court, and issue a citation to the person whose nomination or office is contested, citing them to appear and answer, not less than three nor more than seven days after the date of filing the petition, and the court shall hear said cause, and every such contest shall take precedence over all other business on the court docket. and shall be tried and disposed of with all convenient dispatch. The court shall always be deemed in session for the trial of such cases.

History: En. Sec. 48, Init. Act, Nov. 1912; re-en. Sec. 10813, R. C. M. 1921.

Constitutionality

This section and section 94-1468, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial, or delay, and constitute an attempt to delegate legislative power to the courts. Doty v. Reece, 53 M 404, 407, 164 P 542.

Attorney's Fees and Costs

Under this section and section 94-1468, the prevailing party in an election contest, whether the petitioner or respondent, is entitled to attorney's fees in addition to his other costs and disbursements, the amount to be awarded in that behalf resting upon the sound discretion of the trial court. Doty v. Reece, 53 M 404, 407, 164

Collateral References

Elections 280, 285 (1), 307.
29 C.J.S. Elections §§ 254-256, 259, 260,
268, 271, 319, 320, 322.
26 Am. Jur. 2d 155 et seq., Elections,
§ 336 et seq.

94-1468. (10814) Hearing of contest. The petitioner (contestant) and

the contestee may appear and produce evidence at the hearing, but no person, other than the petitioner and contestee, shall be made a party to the proceedings on such petition; and no person, other than said parties and their attorneys, shall be heard thereon, except by order of the court. If more than one petition is pending, or the election of more than one person is contested, the court may, in its discretion, order the cases to be heard together, and may apportion the costs, disbursements, and attorney's fees between them, and shall finally determine all questions of law and fact, save only that the judge may, in his discretion, impanel a jury to decide on questions of fact. In the case of other nominations or elections, the court shall forthwith certify its decision to the board or official issuing certificates of nomination or election, which board or official shall thereupon issue

certificates of nomination or election to the person or persons entitled thereto by such decision. If judgment of ouster against a defendant shall be
rendered, said judgment shall award the nomination or office to the person
receiving next the highest number of votes, unless it shall be further determined in the action, upon appropriate pleading and proof by the defendant, that some act has been done or committed which would have been
ground in a similar action against such person, had he received the highest
number of votes for such nomination or office, for a judgment of ouster
against him; and if it shall be so determined at the trial, the nomination or
office shall be by the judgment declared vacant, and shall thereupon be
filled by a new election, or by appointment, as may be provided by law regarding vacancies in such nomination or office.

History: En. Sec. 49, Init. Act, Nov. 1912; re-en. Sec. 10814, R. C. M. 1921.

NOTE.—In the case of State ex rel. Smith v. District Court, 50 M 134, 145 P 721, so much of the above section as related to the certification of findings to the secretary of state in the case of contested nominations or election of senators or representatives was held unconstitutional and is omitted from this code.

Constitutionality

If this section permits a candidate who did not receive the highest number of legal votes to be declared elected upon a

judgment of ouster in a contest proceeding, it is void as in contravention of section 13, article IX, of the constitution. Cadle v. Town of Baker, 51 M 176, 185, 149 P 960.

Collateral References

Elections = 279, 300, 303, 307. 29 C.J.S. Elections §§ 261-265, 300, 302-305, 307.

26 Am. Jur. 2d 161 et seq., Elections, § 342 et seq.

Cost or reimbursement for expenses incident to election contest. 106 ALR 928.

94-1469. (10815) Corporations—proceedings against, for violation of act. In like manner as prescribed for the contesting of an election, any corporation organized under the laws of or doing business in the state of Montana may be brought into court on the ground of deliberate, serious, and material violation of the provisions of this act. The petition shall be filed in the district court in the county where said corporation has its principal office, or where the violation of law is averred to have been committed. The court, upon conviction of such corporation, may impose a fine of not more than ten thousand dollars, or may declare a forfeiture of the charter and franchises of the corporation, if organized under the laws of this state, or if it be a foreign corporation, may enjoin said corporation from further transacting business in this state, or by both such fine and forfeiture, or by both such fine and injunction.

History: En. Sec. 50, Init. Act, Nov. 1912; re-en. Sec. 10815, R. C. M. 1921.

Collateral References Elections \$\infty 322, 332. 29 C.J.S. Elections \\$\\$336, 353.

94-1470. (10816) Penalty for violations not otherwise provided for. Whoever violates any provision of this act, the punishment for which is not specially provided by law, shall on conviction thereof be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 51, Init. Act, Nov. 1912; re-en. Sec. 10816, R. C. M. 1921.

94-1471. (10817) Advancement of cases—dismissal, when—privileges of witnesses. Proceedings under this act shall be advanced on the docket upon request of either party for speedy trial, but the court may postpone or continue such trial if the ends of justice may be thereby more effectually secured, and in case of such continuance or postponement, the court may impose costs in its discretion as a condition thereof. No petition shall be dismissed without the consent of the county attorney, unless the same shall be dismissed by the court. No person shall be excused from testifying or producing papers or documents on the ground that his testimony or the production of papers or documents will tend to criminate him; but no admission, evidence, or paper made or advanced or produced by such person shall be offered or used against him in any civil or criminal prosecution, or any evidence that is the direct result of such evidence or information that he may have so given, except in a prosecution for perjury committed in such testimony.

History: En. Sec. 52, Init. Act, Nov. 1912; re-en. Sec. 10817, R. C. M. 1921.

22A C.J.S. Criminal Law §§ 654-656; 29 C.J.S. Elections § 299; 97 C.J.S. Witnesses § 439.

Collateral References

Criminal Law 393 (1); Elections 296; Witnesses 297.

26 Am. Jur. 2d, Elections, p. 169, § 351; p. 202 et seq., § 391 et seq.

94-1472. (10818) Form of complaint. A petition or complaint filed under the provisions of this act shall be sufficient if it is substantially in the following form:

In the District Court of the
________Judicial District,
for the County of ______, State of Montana.

A B (or A B and C D), Contestants, vs.

E F, Contestee.

The petition of contestant (or contestants) above named alleges:

That and were candidates at said election, and the board of canvassers has returned the said as being duly nominated (or elected) at said election.

That contestant A B voted (or had a right to vote, as the case may be) at said election or claims to have had a right to be returned as the nominee or officer elected or nominated at said election, or was a candidate at said election, as the case may be), and said contestant C D (here state in like manner the right of each contestant).

And said contestant (or contestants) further allege (here state the facts and grounds on which the contestants rely).

Said complaint shall be verified by the affidavit of one of the petitioners in the manner required by law for the verification of complaints in civil cases.

History: En. Sec. 53, Init. Act, Nov. 1912; re-en. Sec. 10818, R. C. M. 1921.

Collateral References Elections©=284. 29 C.J.S. Elections § 267.

94-1473. (10819) Form of statement of expenses. The statement of expenses required from candidates and others by this act shall be in substantially the following form:

State of Montana, County of, ss.

I,, having been a candidate (or expended money) at the election for the (state) (district) (county) (city) of, on the, day of, A. D. 19....., being first duly sworn, on oath do say: That I have carefully examined and read the return of my election expenses and receipts hereto attached, and to the best of my knowledge and belief that return is full, correct, and true.

And I further state on oath that, except as appears from this return, I have not, and to the best of my knowledge and belief, no person, nor any club, society, or association has on my behalf, whether authorized by me or not, made any payment, or given, promised, or offered any reward, office, employment, or position, public or private, or valuable consideration, or incurred any liability on account of or in respect of the conduct or management of the said nomination or election.

And I further state on oath that, except as specified in this return, I have not paid any money, security, or equivalent for money, nor has any money or equivalent for money, to my knowledge or belief, been paid, advanced, given, or deposited by anyone to or in the hands of myself or any other person for my nomination or election, or for the purpose of paying any expenses incurred on my behalf on account or in respect of the conduct or management of the said election.

And I further state on oath that I will not, except so far as I may be permitted by law, at any future time make or be a party to the making or giving of any payment, reward, office, position, or employment, or valuable consideration, for the purpose of defraying any such expenses or obligations as herein mentioned for or on account of my nomination or election, or provide or be a party to the providing of any money, security, or equivalent for money for the purpose of defraying any such expense.

(Signature of affiant)

Attached to said affidavit shall be a full and complete account of the receipts, contributions, and expenses of said affiant, and of his supporters of which he has knowledge, with numbered vouchers for all sums and payments for which vouchers are required as to all money expended by affiant. The affidavit and account of the treasurer of any committee or any political party or organization shall be, as nearly as may be, in the same form, and so also shall be the affidavit of any person who has received or expended money in excess of the sum of fifty dollars to aid in securing

the nomination or election or defeat of any candidate, or of any political party or organization, or of any measure before the people.

History: En. Sec. 54, Init. Act. Nov. 1912; re-en. Sec. 10819, R. C. M. 1921.

94-1474. (10820) False oaths or affidavits—perjury. Any person who shall knowingly make any false oath or affidavit where an oath or affidavit is required by this law shall be deemed guilty of perjury and punished accordingly.

History: En. Sec. 55, Init. Act, Nov. 1912; re-en. Sec. 10820, R. C. M. 1921.

Collateral References Perjury 5. 70 C.J.S. Perjury §§ 21, 24.

94-1475. Political literature to contain name of officer of organization or person publishing and producing. It shall be unlawful for any person to publish, print, mimeograph, type or otherwise produce any dodger, bill, handbill, pamphlet or other document which is designed to aid, injure or defeat any candidate or any political party or organization or measure before the people unless it is stated therein the name of the chairman or secretary, or the names of the other officers of the political or other organization publishing, printing, mimeographing, typing or otherwise producing such dodger, bill, handbill, pamphlet or other document or the name of some voter who is responsible therefor with his residence and street address, if any, together with the name of the publisher, printer or the producer thereof with his residence and street address, if any, or his place of business.

History: En. Sec. 1, Ch. 74, L. 1951.

94-1476. Violation of preceding section a misdemeanor. Any person who shall violate the provisions of this act shall be guilty of a misdemeanor.

History: En. Sec. 2, Ch. 74, L. 1951.

Collateral References Elections 309. 29 C.J.S. Elections § 334.

CHAPTER 15

EMBEZZLEMENT AND OTHER OFFENSES BY PUBLIC OFFICERS

Section 94-1501. Embezzlement by public officer.

Officers neglecting to pay over public moneys. "Public moneys" defined. 94-1502.

94-1503.

94-1504. Failure to pay over fines and forfeitures received a misdemeanor.

94-1505. 94-1506. Obstructing officer in collecting revenue.

94-1507.

Refusing to give assessor list of property or giving false name.

Making false statement, not under oath, in reference to taxes.

Delivering receipts for poll taxes other than prescribed by law, or col-94-1508. lecting poll taxes, etc., without giving the receipt prescribed by law. Having blank receipts for licenses other than those prescribed by law.

94-1509.

Refusing to give name of person in employment, etc. Carrying on business without license. 94-1510.

94-1511.

94-1512. Unlawfully acting as auctioneer.

94-1513. Officer charged with collection, etc., of revenue, refusing to permit inspection of his books.

94-1514. Board of examiners, auditor and treasurer neglecting certain duties.

94-1515. Having state arms, etc.

94-1516. Selling state arms, etc. 94-1517. Sheriff falsely representing accounts. 94-1518. Trespass on public property. 94-1519. Limitations on preceding section.

- 94-1501. (11318) Embezzlement by public officer. Every officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who either—
- 1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or
- 2. Loans the same, or any portion thereof, except by deposits in the manner authorized by law, or having the possession or control of any public money, makes profit out of it, or uses the same for any purpose not authorized by law; or
- 3. Fails to keep the same in his possession or under his control until disbursed or paid out by authority of law; or
- 4. Unlawfully deposits the same, or any portion thereof, in any bank, or with any banks or other person; or
- 5. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or
- 6. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or
- 7. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by a competent authority; or
- 8. Willfully omits to transfer the same when such transfer is required by law; or
- 9. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any moneys received by him under any duty imposed by law which compels him to pay over the same; is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state

History: Ap. p. Sec. 770, Pen. C. 1895; en. Sec. 1, Ch. 153, L. 1907; Sec. 8592, Rev. C. 1907; re-en. Sec. 11318, R. C. M. 1921. Cal. Pen. C. Secs. 424, 503, 504.

Cross-Reference

Indictment, sec. 94-6420.

Bill of Particulars-Evidence

Where state at defendant's request furnished a bill of particulars embracing 214 items, court did not err in permitting state examiner to testify that between the alleged dates, defendant, according to his books, collected a certain amount and accounted for a less amount, leaving the shortage charged in the information, even though in arriving at such shortage examiner resorted to ledger entries relating to accounts of several thousand water consumers, such proof not having enlarged the issues beyond the 214 items in the bill of particulars. State v. Kurth, 105 M 260, 263, 72 P 2d 687.

Continuous Series of Acts-Information

In embezzlement of city water rentals, information alleging that employee did on

a certain day in 1931 "and from thence continuously" on divers dates to a given date two years later receive public funds aggregating a given amount which he failed to pay over to the city treasurer, held not open to objection of stating more than one offense nor being duplicitous, under the rule that in such case there is no duplicity where the embezzlement is accomplished by a continuous series of acts, which the state might treat as constituting one embezzlement, irrespective of ordinance requiring daily accounting. State v. Kurth, 105 M 260, 262, 72 P 2d 687

Deposit of County Moneys Without Security

It is a felony for a county treasurer to keep county moneys on a general deposit in a bank without the security required by section 16-2618. Yellowstone County v. First Trust & Savings Bank, 46 M 439, 449, 128 P 596.

Collateral References

Embezzlement©11 (2). 29A C.J.S. Embezzlement § 11.

26 Am. Jur. 2d 584-587, Embezzlement, §§ 34, 35; 43 Am. Jur. 129, Public Officers, § 330.

Purpose to take or retain property in payment of, or as security for, a debt or claim as affecting embezzlement. 13 ALR 145 and 116 ALR 999.

Mistake, embezzlement by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due

or intended. 14 ALR 899.

Embezzlement by partner. 17 ALR 982. Entrapment to commit offense of embezzlement. 18 ALR 160 and 86 ALR 267.

Trustee or person acting in fiduciary capacity, partner as within statute relating to embezzlement by. 41 ALR 474.

Independence of contract considered with relation to embezzlement acts. 43 ALR 356.

Depository or bailee, misappropriation by officer or employee of, as sustaining a criminal charge against him of embezzlement of property of depositor or bailor. 45 ALR 933.

Embezzlement by one spouse of other's

property. 55 ALR 558.

Acceptance of defendant's note or other contractual obligation as affecting charge of embezzlement, 70 ALR 208.

Misappropriation of executor, administrator, guardian, or trustee as embezzlement. 75 ALR 299.

Receivers, assignees in insolvency or trustees in bankruptcy as within classes of persons described by statute denouncing offense of embezzlement. 113 ALR 744.

Statute relating to offense of misappropriating or embezzling public money or property as applicable to one not in possession. 128 ALR 1373.

Check, note, etc., or signature thereon, charge of embezzlement predicated upon fraudulent obtaining of, from the person executing the same. 141 ALR 216.

Employee or subordinate, statutes relating to embezzlement of public money by officer in charge thereof as applicable to. 144 ALR 590.

Larceny and embezzlement, distinction between. 146 ALR 532.

Failure of one hiring vehicle to return it as agreed, as embezzlement. 45 ALR

Embezzlement by independent collector or collection agency working on commission or percentage. 56 ALR 2d 1156.

Computer programs as property subject to theft. 18 ALR 3d 1121.

94-1502. (11319) Officers neglecting to pay over public moneys. Every officer charged with the receipt, safekeeping, or disbursement of any public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

History: En. Sec. 771, Pen. C. 1895; re-en. Sec. 8593, Rev. C. 1907; re-en. Sec. 11319, R. C. M. 1921. Cal. Pen. C. Sec. 425.

Distinguished From Larceny by Bailee

Where the evidence was insufficient to support a conviction under the charge of larceny by bailee under section 94-2701, which makes the appropriation and intent the necessary elements, it would have been sufficient under this section where appropriation to one's own use with the intent to deprive the state of its property need not be shown. State v. McGuire, 107 M 341, 346, 88 P 2d 35.

Collateral References

26 Am. Jur. 2d 584-587, Embezzlement, §§ 34, 35; 43 Am. Jur. 129, Public Officers, § 330.

94-1503. (11320) "Public moneys" defined. The phrase "public moneys," as used in this code, includes all bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, city, or town officers in their official capacity.

History: En. Sec. 772, Pen. C. 1895; re-en. Sec. 8594, Rev. C. 1907; re-en. Sec. 11320, R. C. M. 1921. Cal. Pen. C. Sec. 426.

Collateral References

Embezzlement 56. 29A C.J.S. Embezzlement § 6.

Cross-Reference

Judgments, etc., how pleaded, sec. 94-6415.

94-1504. (11321) Failure to pay over fines and forfeitures received a misdemeanor. If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law, and within thirty days after the receipt thereof, is guilty of a misdemeanor.

History: En. Sec. 773, Pen. C. 1895; re-en. Sec. 8595, Rev. C. 1907; re-en. Sec. 11321, R. C. M. 1921. Cal. Pen. C. Sec. 427.

94-1505. (11322) Obstructing officer in collecting revenue. Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which this state is interested, and which such officer is by law empowered to collect, or who obstructs or hinders any public officer in the discharge of his duty, is guilty of a misdemeanor.

History: En. Sec. 774, Pen. C. 1895; re-en. Sec. 8596, Rev. C. 1907; re-en. Sec. 11322, R. C. M. 1921. Cal. Pen. C. Sec. 428.

Collateral References
Obstructing Justice.7.
67 C.J.S. Obstructing Justice § 5.
39 Am. Jur. 506 et seq., Obstructing Justice, § 8 et seq.

94-1506. (11323) Refusing to give assessor list of property or giving false name. Every person who unlawfully refuses, upon demand, to give to any county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name or fraudulently refuses to give his true name to any assessor, when demanded by such assessor, in the discharge of his official duties, is guilty of a misdemeanor.

History: En. Sec. 775, Pen. C. 1895; re-en. Sec. 8597, Rev. C. 1907; re-en. Sec. 11323, R. C. M. 1921. Cal. Pen. C. Sec. 429. Collateral References
Taxation ≈ 335½.
85 C.J.S. Taxation § 1025 et seq.
51 Am. Jur. 628 et seq., Taxation, § 667

94-1507. (11324) Making false statement, not under oath, in reference to taxes. Every person who, in making any statement, not upon oath, oral or written, which is required or authorized by law to be made, as the basis of imposing any tax or assessment or of an application to reduce any tax or assessment, willfully states anything which he knows to be false, is guilty of a misdemeanor.

History: En. Sec. 776, Pen. C. 1895; re-en. Sec. 8598, Rev. C. 1907; re-en. Sec. 11324, R. C. M. 1921. Cal. Pen. C. Sec. 430.

94-1508. (11325) Delivering receipts for poll taxes other than prescribed by law, or collecting poll taxes, etc., without giving the receipt prescribed by law. Every person who uses or gives any receipt, except that prescribed by law, as evidence of the payment of any poll tax, road tax, or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one person therein, is guilty of a misdemeanor.

History: En. Sec. 777, Pen. C. 1895; re-en. Sec. 8599, Rev. C. 1907; re-en. Sec. 11325, R. C. M. 1921. Cal. Pen. C. Sec. 431.

Collateral References
Taxation € 528½.
84 C.J.S. Taxation §§ 625, 626.
51 Am. Jur. 842, Taxation, § 959.

94-1509. (11326) Having blank receipts for licenses other than those prescribed by law. Every person who has in his possession, with intent to circulate or sell, any blank licenses or poll tax receipts other than those furnished by the officer authorized by law, is guilty of a felony.

History: En. Sec. 778, Pen. C. 1895; re-en. Sec. 8600, Rev. C. 1907; re-en. Sec. 11326, R. C. M. 1921, Cal. Pen. C. Sec. 432.

94-1510. (11327) Refusing to give name of person in employment, etc. Every person who, when requested by the collector of taxes or licenses, refuses to give to such collector the name and residence of each man in his employment, or to give such collector access to the building or place where such men are employed, is guilty of a misdemeanor.

History: En. Sec. 779, Pen. C. 1895; re-en. Sec. 8601, Rev. C. 1907; re-en. Sec. 11327, R. C. M. 1921. Cal. Pen. C. Sec. 434. Collateral References
Taxation \$\simes 603.
84 C.J.S. Taxation \$ 640 et seq.
51 Am. Jur. 632, Taxation, \$ 672.

94-1511. (11328) Carrying on business without license. Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring a license prescribed by such law, is guilty of a misdemeanor.

History: En. Sec. 780, Pen. C. 1895; re-en. Sec. 8602, Rev. C. 1907; re-en. Sec. 11328, R. C. M. 1921, Cal. Pen. C. Sec. 435.

Cross-Reference

Prosecution for failure to procure license, sec. 84-2703.

Collateral References

Licenses \$40.
53 C.J.S. Licenses \$66.
33 Am. Jur. 389 et seq., Licenses, \$75 et seq.

94-1512. (11329) Unlawfully acting as auctioneer. Every person who acts as an auctioneer in violation of the laws of this state relating to auctions and auctioneers, is guilty of a misdemeanor.

History: En. Sec. 781, Pen. C. 1895; re-en. Sec. 8603, Rev. C. 1907; re-en. Sec. 11329, R. C. M. 1921. Cal. Pen. C. Sec. 436.

Collateral References

Auctions and Auctioneers \$13.
7 C.J.S. Auctions and Auctioneers \$17.
7 Am. Jur. 2d 222 et seq., Auctions and Auctioneers, \$2 et seq.

94-1513. (11330) Officer charged with collection, etc., of revenue, refusing to permit inspection of his books. Every person charged with the collection, receipt, or disbursement of any portion of the revenue of this state, who, upon demand, fails or refuses to permit the state examiner, state auditor, or attorney general to inspect his books, papers, receipts, and records pertaining to his office, is guilty of a misdemeanor.

History: En. Sec. 782, Pen. C. 1895; re-en. Sec. 8604, Rev. C. 1907; re-en. Sec. 11330, R. C. M. 1921. Cal. Pen. C. Sec. 440.

Collateral References
Taxation 571.
84 C.J.S. Taxation § 684.

94-1514. (11331) Board of examiners, auditor and treasurer neglecting certain duties. Every member of the board of examiners, and every state auditor, or state treasurer who violates any of the provisions of the laws of

this state relating to the board of examiners, or prescribing its powers and duties, is guilty of a felony.

History: En. Sec. 783, Pen. C. 1895; re-en. Sec. 8605, Rev. C. 1907; re-en. Sec. 11331, R. C. M. 1921. Cal. Pen. C. Sec. 441.

94-1515. (11332) Having state arms, etc. Every person who unlawfully retains in his possession any arms, equipments, elothing, or military stores belonging to the state, or the property of any company of the state militia, is guilty of a misdemeanor.

History: En. Sec. 784, Pen. C. 1895; re-en. Sec. 8606, Rev. C. 1907; re-en. Sec. 11332, R. C. M. 1921.

Collateral References
Militia 523.
57 C.J.S. Militia § 17.
36 Am. Jur. 272, Military, § 129.

94-1516. (11333) Selling state arms, etc. Every member of the state militia who unlawfully disposes of any arms, equipments, clothing, or military stores, the property of this state, or of any company of the state militia, is guilty of a misdemeanor.

History: En. Sec. 785, Pen. C. 1895; re-en. Sec. 8607, Rev. C. 1907; re-en. Sec. 11333, R. C. M. 1921.

94-1517. (11334) Sheriff falsely representing accounts. Every person who violates any of the provisions of sections 25-225 and 25-229, relating to sheriff, is guilty of a felony.

History: En. Sec. 786, Pen. C. 1895; re-en. Sec. 8608, Rev. C. 1907; re-en. Sec. 11334, R. C. M. 1921.

Collateral References

Sheriffs and Constables \$153. 80 C.J.S. Sheriffs and Constables \$188. 47 Am. Jur. 889-891, Sheriffs, Police, and Constables, §§ 100, 101.

94-1518. (11335) Trespass on public property. If any person shall willfully injure or trespass or commit waste upon any premises, or shall damage, deface, or destroy any house, improvement, or other like property, such premises, house, improvement, or property being then and there the property of this state, the person or persons so offending shall be deemed guilty of a misdemeanor if the damage does not exceed fifty dollars; and of a felony if such damage exceeds fifty dollars. If convicted of a misdemeanor, in this section defined, the defendant shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail not more than sixty days, or by both such fine and imprisonment. If convicted of the felony herein defined, the person so convicted shall be punished by imprisonment at hard labor in the penitentiary not less than six months nor more than ten years, and in addition to penalties before mentioned the party convicted shall be liable to the state in the sum of three times the value of the property taken, the damage done or the property destroyed, to be recovered in a civil action.

History: En. Sec. 1, p. 45, L. 1893; re-en. Sec. 787, Pen. C. 1895; re-en. Sec. 8609, Rev. C. 1907; re-en. Sec. 11335, R. C. M. 1921.

Cross-Reference

Committing waste or trespass on state lands, sec. 94-3334.

Collateral References
Trespass € 79, 79.
87 C.J.S. Trespass § 144, 160.

94-1519. (11336) Limitations on preceding section. The foregoing section shall not apply to uninclosed granted lands to the state, which are not occupied and have no improvements or inclosures thereon so far as mere trespass, not malicious, is concerned, but shall apply to any waste or destruction thereon, or to the cutting or removing of timber therefrom, or the destruction of the same. All fines collected and all moneys recovered by virtue of this section must be paid into the school fund of the state.

History: En. Sec. 788, Pen. C. 1895; re-en. Sec. 8610, Rev. C. 1907; re-en. Sec. 11336, R. C. M. 1921.

CHAPTER 16

EXTORTION

Section 94-1601. Extortion defined. What threats constitute extortion. Punishment of extortion in certain cases. 94-1602. 94-1603. 94-1604. Obtaining signature by means of threats. 94-1605. Compulsion to execute instrument. 94-1606. Oppression committed under color of official right. 94-1607. Extortion committed under color of official right. 94-1608. Punishment of extortion committed under color Punishment of extortion committed under color of official right. 94-1609. Blackmail. 94-1610. Written threats. Verbal threats. 94-1611. 94-1612. Unlawful threat referring to act of third person. Employee of railroad company taking more fare, etc. 94-1613. 94-1614. Requiring release of liability, etc. 94-1615. Extortion—refusal to pay wages without discount. 94-1616. Receipt or solicitation of gifts by foremen from employees. 94-1617. Immunity of witnesses.

94-1601. (11389) Extortion defined. Extortion is the obtaining of property from another with his consent induced by wrongful use of force or fear or under color of official right.

History: En. Sec. 910, Pen. C. 1895; re-en. Sec. 8663, Rev. C. 1907; re-en. Sec. 11389, R. C. M. 1921. Cal. Pen. C. Sec. 518.

Cross-Reference

Extortion by telephone, sec. 94-35-221.5.

Instruction on This Section

The giving of an instruction defining the word "extortion" in the language of the statute held not objectionable as a bare statement of a proposition of law, in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. Edquest v. Tripp & Dragstedt Co., 93 M 446, 461, 19 P 2d 637.

Collateral References

Extortion =1.

35 C.J.S. Extortion § 1.

31 Am. Jur. 2d 900, Extortion, Blackmail, and Threats, § 1.

Innocence of a person threatened as affecting rights or remedies in respect of contracts made or money paid to prevent or suppress a criminal prosecution, 17 ALR 339, 344.

Criminal liability, extortion predicated upon statements or intimations regarding, in connection with attempt to collect or settle a claim which defendant believed to be valid. 135 ALR 728.

94-1602. (11390) What threats constitute extortion. Fear, such as will constitute extortion, may be induced by a threat either—

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or

- To accuse him or any relative or member of his family of any crime; or,
 - To expose or impute to them or him any deformity or disgrace; or, 3.
 - To expose any secret affecting him or them.

History: Ap. p. Sec. 128, p. 298, Cod. Stat. 1871; re-en. Sec. 128, 4th Div. Rev. Stat. 1879; re-en. Sec. 137, 4th Div. Comp. Stat. 1887; en. Sec. 911, Pen. C. 1895; re-en. Sec. 8664, Rev. C. 1907; re-en. Sec. 11390, R. C. M. 1921. Cal. Pen. C. Sec. 519.

Instruction on This Section

The giving of an instruction defining the word "extortion" in the language of the statute held not objectionable as a bare statement of a proposition of law, in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. Edquest v. Tripp & Dragstedt Co., 93 M 446, 461, 19 P 2d 637.

Threat To Discharge Worker

The right of an employee to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion. In re McCabe, 29 M 28, 30, 73 P 1106.

Collateral References

Threats 1 (1).

86 C.J.S. Threats and Unlawful Communications § 2 et seq. 31 Am. Jur. 2d 907, Extortion, Blackmail, and Threats, § 10.

(11391) Punishment of extortion in certain cases. Every person who extorts money or other property from another under circumstances not amounting to robbery by means of force or any threat such as is mentioned in the preceding section is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 912, Pen. C. 1895; re-en. Sec. 8665, Rev. C. 1907; re-en. Sec. 11391, R. C. M. 1921. Cal. Pen. C. Sec. 520.

94-1604. (11392) Obtaining signature by means of threats. Every person who by any extortionate means obtains from another his signature to any paper or instrument whereby, if such signature were freely given, any property would be transferred or any debt, demand, charge, or right of action created is punishable in the same manner as if the actual delivery of such debt, demand, charge or right of action were obtained.

History: En. Sec. 913, Pen. C. 1895; re-en. Sec. 8666, Rev. C. 1907; re-en. Sec. 11392, R. C. M. 1921. Cal. Pen. C. Sec. 522.

94-1605. (11393) Compulsion to execute instrument. The compelling or inducing another by force or threat to make, subscribe, seal, execute, alter, or destroy any valuable security or instrument, or writing affecting or intended to affect any cause of action or defense or any property is extortion under the provisions of the three preceding sections.

History: En. Sec. 914, Pen. C. 1895; re-en. Sec. 8667, Rev. C. 1907; re-en. Sec. 11393, R. C. M. 1921.

- 94-1606. (11394) Oppression committed under color of official right. Every public officer or person pretending to be such who unlawfully and maliciously, under pretense or color of official authority—
 - Arrests another or detains him against his will; or,
 - Seizes or levies upon another's property; or,

- 3. Dispossesses another of any lands or tenements; or,
- 4. Does any other act whereby another person is injured in his person, property or rights, is guilty of a misdemeanor.

History: En. Sec. 915, Pen. C. 1895; re-en. Sec. 8668, Rev. C. 1907; re-en. Sec. 11394, R. C. M. 1921.

- 94-1607. (11395) Extortion committed under color of official right. Every public officer who asks or receives or agrees to receive a fee or other compensation for his official services, either:
- In excess of the fee or compensation allowed to him by statute therefor; or,
- 2. Where no fee or compensation is allowed to him by statute therefor; is guilty of a misdemeanor.

History: En. Sec. 916, Pen. C. 1895; re-en. Sec. 8669, Rev. C. 1907; re-en. Sec. 11395, R. C. M. 1921.

Collateral References

Extortion \$\sim 8.

35 C.J.S. Extortion § 6.

31 Am. Jur. 2d 904, Extortion, Blackmail, and Threats, § 5.

94-1608. (11396) Punishment of extortion committed under color of official right. Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed by this code, is guilty of a misdemeanor.

History: En. Sec. 917, Pen. C. 1895; re-en. Sec. 8670, Rev. C. 1907; re-en. Sec. 11396, R. C. M. 1921. Cal. Pen. C. Sec. 521.

Collateral References

Extortion = 18.

35 C.J.S. Extortion § 45. 31 Am. Jur. 2d 905, Extortion, Black-mail, and Threats, § 7.

94-1609. (11397) Blackmail. Every person who, knowing the contents thereof, and with intent by means thereof, to extort or gain any money or other property, or to do, abet or procure any illegal or wrongful act, sends, delivers or in any manner causes to be forwarded or received, or makes or parts with for the purpose that there may be sent or delivered, any letter or writing whether subscribed or not, threatening:

- To accuse any person of crime; or,
- To do any injury to any person or to any property; or,
- To publish or connive at publishing any libel; or,
- To expose or impute to any person any deformity or disgrace; or,
- To expose any secret affecting any person;

is punishable by imprisonment in the state prison, not exceeding five years. or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 918, Pen. C. 1895; re-en. Sec. 8671, Rev. C. 1907; re-en. Sec. 11397, R. C. M. 1921. Cal. Pen. C. Sec. 523.

Collateral References

Extortion 1; Threats 1. 35 C.J.S. Extortion § 1; 86 C.J.S. Threats and Unlawful Communications § 3 et seq. 31 Am. Jur. 2d 900 et seq., Extortion, Blackmail, and Threats, § 1 et seq.

94-1610. (11398) Written threats. Every person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing, whether subscribed or not, threatening to

do an unlawful injury to the person or property of another, is guilty of a misdemeanor.

History: En. Sec. 919, Pen. C. 1895; re-en. Sec. 8672, Rev. C. 1907; re-en. Sec. 11398, R. C. M. 1921.

Collateral References
Threats 1.

86 C.J.S. Threats and Unlawful Communications § 1 et seq. 31 Am. Jur. 2d 911 et seq., Extortion, Blackmail, and Threats, § 14 et seq.

Words as criminal offense other than libel or slander, 48 ALR 83.

94-1611. (11399) Verbal threats. Every person who, under circumstances not amounting to robbery or an attempt at robbery, with intent to gain or extort any money or other property, verbally makes such a threat as would be criminal under either of the preceding sections of this chapter if made or communicated in writing, is guilty of a misdemeanor.

History: En. Sec. 920, Pen. C. 1895; re-en. Sec. 8673, Rev. C. 1907; re-en. Sec. 11399, R. C. M. 1921.

94-1612. (11400) Unlawful threat referring to act of third person. It is immaterial whether a threat made as specified in this chapter is of things to be done or omitted by the offender or by any other person.

History: En. Sec. 921, Pen. C. 1895; re-en. Sec. 8674, Rev. C. 1907; re-en. Sec. 11400, R. C. M. 1921.

94-1613. (11401) Employee of railroad company taking more fare, etc. Every officer, agent, or employee of a railroad company, who asks or receives a greater sum than is allowed by law for the carriage of passengers or freight, is guilty of a misdemeanor.

History: En. Sec. 922, Pen. C. 1895; re-en. Sec. 8675, Rev. C. 1907; re-en. Sec. 11401, R. C. M. 1921. Cal. Pen. C. Sec. 525.

Collateral References

Carriers 21.
13 C.J.S. Carriers §§ 515-522, 587, 589.

94-1614. (11402) Requiring release of liability, etc. Every person, company or corporation, which requires of its servants or employees, as a condition of their employment or otherwise, any contract or agreement whereby such person, company or corporation is released or discharged from liability or responsibility on account of personal injuries received by such servants or employees, while in the service of such person, company or corporation, by reason of the negligence of such person, company or corporation, or the agents or employees thereof, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

History: En. Sec. 923, Pen. C. 1895; re-en. Sec. 8676, Rev. C. 1907; re-en. Sec. 11402, R. C. M. 1921.

Cross-Reference

Contracts releasing liability for negligence void, sec. 13-803.

Collateral References

Master and Servant 100 (1). 56 C.J.S. Master and Servant § 196.

94-1615. (11403) Extortion—refusal to pay wages without discount. Every person, company, or corporation indebted to another person for labor, or any agent of any person, copartnership, or corporation so indebted, who

shall, with intent to secure from such other person a discount upon the payment of such indebtedness, willfully refuse to pay the same, or falsely deny the same, or the amount or validity thereof, or that the same is due, is guilty of a misdemeanor; provided, however, that nothing herein contained shall prohibit any employer from fixing regular paydays for the payment of wages or salary earned in the calendar month immediately preceding such paydays, except in cases where the employee is discharged.

History: En. Sec. 1, Ch. 144, L. 1907; Sec. 8677, Rev. C. 1907; re-en. Sec. 11403, R. C. M. 1921.

Collateral References Master and Servant@=84. 56 C.J.S. Master and Servant §§ 103,

94-1616. (11404) Receipt or solicitation of gifts by foremen from employees. Any superintendent, foreman, assistant, boss, or any other person or persons who shall receive or solicit, or cause to be received or solicited, any sum of money or other valuable consideration from any person for or on account of the employment or the continuing of the employment of such person, or of anyone else, or for or on account of any promise or agreement to employ or to continue to employ any such person, or anyone else, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than one thousand dollars, or undergo an imprisonment in the county jail of not more than one year, or both, at the discretion of the court.

History: En. Sec. 1, Ch. 52, L. 1907; Sec. 8678, Rev. C. 1907; re-en. Sec. 11404, R. C. M. 1921.

94-1617. (11405) Immunity of witnesses. No person shall be excused from attending or testifying, or producing any books, papers, documents, or any thing or things before any court or magistrate upon any investigation, proceeding, or trial for a violation of any of the provisions of this act, upon the ground, or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a erime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify, or produce evidence, documentary or otherwise; and no testimony or evidence so given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

History: En. Sec. 2, Ch. 52, L. 1907; Sec. 8679, Rev. C. 1907; re-en. Sec. 11405, R. C. M. 1921.

Collateral References

Criminal Law 2: Witnesses 304.

22 C.J.S. Criminal Law §§ 41, 46; 98

C.J.S. Witnesses § 439.
21 Am. Jur. 2d 215 et seq., Criminal
Law, § 146 et seq.; 58 Am. Jur. 72 et seq., Witnesses, § 84 et seq.

CHAPTER 17

FALSIFYING EVIDENCE

Section 94-1701. Offering false evidence. 94-1702. Deceiving a witness. 94-1703. Preparing false evidence.

94-1704. Destroying evidence.

94-1705. Preventing or dissuading witness from attending.94-1706. Bribing witness.94-1707. Receiving or offering to receive bribes.

94-1701. (10891) Offering false evidence. Every person who, upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, or record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered or antedated, is guilty of felony.

History: En. Sec. 260, Pen. C. 1895; re-en. Sec. 8245, Rev. C. 1907; re-en. Sec. 10891, R. C. M. 1921. Cal. Pen. C. Sec. 132.

Collateral References Obstructing Justice 5. 67 C.J.S. Obstructing Justice § 9.

94-1702. (10892) Deceiving a witness. Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness, or any person about to be called as a witness, upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

History: En. Sec. 261, Pen. C. 1895; re-en. Sec. 8246, Rev. C. 1907; re-en. Sec. 10892, R. C. M. 1921. Cal. Pen. C. Sec. 133.

(10893) Preparing false evidence. Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

History: En. Sec. 262, Pen. C. 1895; re-en. Sec. 8247, Rev. C. 1907; re-en. Sec. 10893, R. C. M. 1921. Cal. Pen. C. Sec. 134.

94-1704. (10894) Destroying evidence. Every person who, knowing that any book, paper, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

History: En. Sec. 263, Pen. C. 1895; re-en. Sec. 8248, Rev. C. 1907; re-en. Sec. 10894, R. C. M. 1921. Cal. Pen. C. Sec. 135.

Operation and Effect

Evidence in murder prosecution showed that defendant had planned to commit robbery by taking personal property from the custody of an officer who had seized it as stolen property. An instruction of-

fered on the theory (based on section 94-4202 and this section) that he had merely committed a misdemeanor in attempting to take and destroy evidence, and therefore could not be held guilty of murder in the first degree in the absence of a showing of premeditation, delibera-tion and malice, was properly refused as not applicable to the evidence. State v. Reagin, 64 M 481, 489, 210 P 86.

94-1705. (10895) Preventing or dissuading witness from attending. Every person who willfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor.

History: En. Sec. 264, Pen. C. 1895; re-en. Sec. 8249, Rev. C. 1907; re-en. Sec. 10895, R. C. M. 1921. Cal. Pen. C. Sec. 136.

Secreting Witness

The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted a misdemeanor under this section. Buntin v. Chicago, M. & St. P. Ry. Co., 54 M 495, 496, 172 P 330.

Accused's attempt to hide state's witness and to intimidate her could have been grounds for prosecution under this statute. State v. Crockett, 148 M 402, 421 P 2d 722.

Collateral References

Obstructing Justice 4.
67 C.J.S. Obstructing Justice 8.
39 Am. Jur. 504, Obstructing Justice,
6.

94-1706. (10896) Bribing witness. Every person who gives, or offers or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to introduce any person to give false or withhold true testimony, is guilty of a felony.

History: En. Sec. 265, Pen. C. 1895; re-en. Sec. 8250, Rev. C. 1907; re-en. Sec. 10896, R. C. M. 1921. Cal. Pen. C. Sec. 137.

Collateral References

Bribery 1 (1); Obstructing Justice 5.

11 C.J.S. Bribery §§ 1, 2; 67 C.J.S. Obstructing Justice § 9.
41 Am. Jur. 5, Perjury, § 4.

94-1707. (10897) Receiving or offering to receive bribes. Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of felony.

History: En. Sec. 266, Pen. C. 1895; re-en. Sec. 8251, Rev. C. 1907; re-en. Sec. 10897, R. C. M. 1921. Cal. Pen. C. Sec. 138.

CHAPTER 18

FALSE PERSONATION AND CHEATS

Section 94-1801. Marrying under false personation. 94-1802. Falsely personating another in other cases. False statement respecting financial condition. Receiving property in a false character. 94-1803. 94-1804. 94-1805. Obtaining money, property or services by false pretenses. 94-1806. Confidence games. 94-1807. Selling land twice. 94-1808. Married person selling land under false representations. 94-1809. Mock auction. Consignee, false statement by. 94-1810. 94-1811. Selling or removing mortgaged property to defraud mortgagee. 94-1812. Conditional sale or lease—removal, sale or concealment of property to defraud vendor or lessor-larceny. False pedigree of animals, etc. 94-1813. Selling animal with false pedigree.
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Use of false device as evidence of knowledge of falsity. 94-1828.

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94-1801. (11406) Marrying under false personation. Every person who falsely personates another, and in such assumed character marries or pretends to marry, or to sustain the marriage relation towards another, with or without connivance of such other, is guilty of a felony.

History: En. Sec. 930, Pen. C. 1895; re-en. Sec. 8680, Rev. C. 1907; re-en. Sec. 11406, R. C. M. 1921. Cal. Pen. C. Sec. 528.

Collateral References

False Personation € 1.

35 C.J.S. False Personation §§ 1, 2.

32 Am. Jur. 2d 170, False Personation,

Criminal responsibility of one aiding and abetting the offense of false personation. 5 ALR 784; 74 ALR 1110 and 131 ALR 1322.

Telephone conversation as false pretense. 8 ALR 656.

Business transaction, false representations in, as within statute as to "confidence game." 9 ALR 1527 and 56 ALR

Vagrancy, operating confidence game as.

14 ALR 1501.

Governmental agency, presentation of and attempt to establish fraudulent claim against. 21 ALR 180.

Loan or renewal thereof, nature of pretense on which prosecution for obtaining by false pretenses, may be based. 24 ALR 937 and 52 ALR 1167.

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Corporate stock, misrepresentation or mistake as to accessibility of, as one of law or of fact. 65 ALR 1256.

Evidence in prosecution for false pretense in obtaining money under promise of marriage, of similar attempts on other occasions, to establish fraudulent purpose or intent. 80 ALR 1328 and 78 ALR 2d 1359.

Attempt to obtain property by false pretenses as affected by failure to deceive prosecutor or fact that he did not rely on pretenses. 89 ALR 342.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense. 95 ALR 1249 and 128 ALR 1520. Intent as affecting offense of false per-

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Conditional sale, offense of obtaining property by false pretenses predicated upon transaction involving. 134 ALR 874.

Insurance policy, criminal offense of obtaining money under false pretenses predicated upon receipt or claim of benefits under. 135 ALR 1157.

Benevolent or charitable purpose, criminal offense of obtaining property by false pretenses predicated upon promissory representations incident to raising of funds for. 145 ALR 307.

Crime of false pretenses as predicable upon present intention not to comply with promise or statement as to future act. 168 ALR 133.

Obtaining payment by debtor on valid indebtedness by false representations as criminal false pretenses. 20 ALR 2d 1266.

False pretense or allied criminal fraud by partner with respect to partnership property. 43 ALR 2d 1253.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense. 53 ALR 2d 1215.

(11407) Falsely personating another in other cases. Every person who falsely personates another, and in such assumed character, $_{
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 Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or,

2. Verifies, publishes, acknowledges, or proves in the name of another person, any written instrument, with intent that the same may be recorded,

delivered and used as true; or,

3. Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person; or,

4. Confesses a judgment,

is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

History: Ap. p. Sec. 97, p. 200, Bannack Stat.; re-en. Sec. 109, p. 294, Cod. Stat. 1871; re-en. Sec. 109, 4th Div. Rev. Stat. 1879; re-en. Sec. 117, 4th Div. Comp. Stat. 1887; en. Sec. 931, Pen. C. 1895; re-en. Sec. 8681, Rev. C. 1907; re-en. Sec. 11407, R. C. M. 1921. Cal. Pen. C. Sec. 529.

Collateral References

32 Am. Jur. 2d 167 et seq., False Personation, § 1 et seq.

Larceny by appropriation of property, possession of which was obtained by impersonating owner thereof. 26 ALR 389.

94-1803. (11408) False statement respecting financial condition. Any person who, either individually or in a representative capacity—

- 1. Shall knowingly make a false statement in writing to any person, firm or corporation engaged in banking or other business respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as member, director, officer, employee or agent, for the purpose of procuring a loan, or credit in any form or an extension of credit from the person, firm or corporation to whom such false statement is made, either for his own use or for the use of the firm or corporation with which he is connected as aforesaid; or,
- 2. Having previously made, or having knowledge that another has previously made, a statement in writing to any person, firm or corporation engaged in banking or other business respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as aforesaid, shall afterwards procure on faith of such statement from the person, firm or corporation to whom such previous statement has been made, either for his own use, or for the use of the firm or corporation with which he is so connected, a loan or credit in any form, or an extension of credit, knowing at the time of such procuring, that such previously made statement is in any material particular false, with respect to the present financial conditions of himself or of the firm or corporation with which he is so connected; or,
- 3. Shall deliver to any note broker or other agent for the sale or negotiation of commercial paper any statement in writing, knowing the same to be false, respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as aforesaid, for the purpose of having such statement used in the furtherance of the sale, pledge or negotiating of any note, bill, or other instrument, for the payment of money made, or endorsed or accepted, or owned in whole or in part, by him individually or by the firm or corporation with which he is so connected; or,

4. Having previously delivered, or having knowledge that another has previously delivered to any note broker or other agent for the sale or negotiation of commercial paper, a statement in writing respecting his own financial condition, or the financial condition of any firm or corporation with which he is connected as aforesaid, shall afterwards deliver to such note broker or other agent for the purpose of sale, pledge or negotiation on faith of such statement, any note, bill or other instrument for the payment of money made, or endorsed, or accepted, or owned in whole or in part, by himself individually or by the firm or corporation with which he is so connected, knowing at the time that such previously delivered statement is in any material particular false as to the present financial condition of himself or such firm or corporation,

is punishable by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both.

History: En. Sec. 1, Ch. 96, L. 1909; re-en. Sec. 11408, R. C. M. 1921.

Collateral References

False Pretenses 7 (4).

35 C.J.S. False Pretenses §§ 4, 9, 10, 12-15, 19.

32 Am. Jur. 2d False Pretenses, p. 193, § 27; p. 203, § 44.

94-1804. (11409) Receiving property in a false character. Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

History: Ap. p. Sec. 98, p. 201, Bannack Stat.; re-en. Sec. 110, p. 294, Cod. Stat. 1871; re-en. Sec. 110, 4th Div. Rev. Stat. 1879; re-en. Sec. 118, 4th Div. Comp. Stat. 1887; en. Sec. 932, Pen. C. 1895; re-en. Sec. 8682, Rev. C. 1907; re-en. Sec. 11409, R. C. M. 1921. Cal. Pen. C. Sec. 530.

Collateral References

False Pretenses 19. 35 C.J.S. False Pretenses §§ 4, 33.

32 Am. Jur. 2d 167 et seq., False Personation, § 1 et seq.

Criminal responsibility of one aiding and abetting the offense of false personation. 5 ALR 784; 74 ALR 1110 and 131 ALR 1322.

Larceny by appropriation of property, possession of which was obtained by impersonating owner thereof. 26 ALR 389.

94-1805. (11410) Obtaining money, property or services by false pretenses. Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, including evidence of indebtedness, or who knowingly and designedly obtains the service of another by false or fraudulent representation or pretenses, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently receives services or gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property or services so obtained.

History: En. Sec. 933, Pen. C. 1895; re-en. Sec. 8683, Rev. C. 1907; amd. Sec. 1, Ch. 60, L. 1921; re-en. Sec. 11410, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1959. Cal. Pen. C. Sec. 532.

Application

A defendant charged under section 94-1806 with obtaining property by means of a confidence game cannot be convicted on evidence which shows that the defendant obtained such property "by false or fraudulent representation or pretenses" under this section because such crimes are separate and distinct offenses. State v. Allen, 128 M 306, 275 P 2d 200, 201. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

Charge

Information need not allege the very words of the pretenses or whether they were spoken or written to conform to section 94-7219 relating to the kind and character of proof essential to a conviction. State v. Foot, 100 M 33, 45, 48 P 2d 1113.

It is not essential that the information charging an offense under this section contain an allegation of actual ownership nor the allegation of facts showing such ownership. Lawful possession is all that is necessary. The section does not require that the money or property necessarily belong to the person defrauded and we have no authority for writing that requirement into the statute. The information should not be required to allege more elements in charging a crime than the statute defining the crime requires. State v. Hanks, 116 M 399, 408, 153 P 2d 220.

Where a statute uses general or generic words in defining the offense the information or indictment bottomed upon that statute must specify the particular facts which constitute the offense. State v. Hale, 129 M 449, 291 P 2d 229, 232, distinguished in 135 M 449, 453, 340 P 2d 157, 160, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

An information may be drawn consistent with this section and not be vulnerable to the objection that it is bad for duplicity for charging an offense under section 94-3908 (presenting fraudulent claim to a county). State v. Hale, 129 M 449, 291 P 2d 229, 234, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Information which avers only that the defendant made a "false" or "fraudulent" representation is not sufficient. It must expressly allege the facts which made the stated pretense false. State v. Hale, 129 M 449, 291 P 2d 229, 231, overruled on another point, 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

To characterize a representation as "false" or "fraudulent" does not suffice to state the offense. The particulars in which the representations relied upon are false must appear from facts directly and positively set out. State v. Hale, 129 M 449, 291 P 2d 229, 232, overruled on another point, 142 M 459, 462, 384 P 2d 749.

(Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Check Payable to Defendant's Wife

Money received in form of check payable to defendant's wife was money received by defendant in light of evidence that family was living together, that money was used for household support of family and that defendant's wife acted in secretarial capacity in defendant's business operations; fact that defendant had not received check made out to him personally did not mean that element of crime of obtaining money by false pretenses had not been established. State v. Lagerquist, — M —, 445 P 2d 910.

Complaint in Justice Court

Use of term "feloniously" in complaint in justice court charging defendant with offense of obtaining money by false pretenses was not reversible error where complaint specifically stated that offense charged was misdemeanor. Petition of Brown, 150 M 483, 436 P 2d 693.

Evidence of an Offense Not Charged in the Information

Where a county officer is charged with collecting illegal fees, by presenting a claim under the name of another to the county for work which was within his duties as county surveyor it was prejudicial error for the court to admit evidence of another claim submitted by the county surveyor to the county which offense was not charged in the information (Justices Bottomly and Angstman dissenting). State v. Hale, 126 M 326, 249 P 2d 495, 496.

Lesser Included Offenses

Crimes under Packaged Commodities Offered for Sale Act (90-601 et seq., since repealed) and under False Weights and Measures Act (94-1901 et seq.), both misdemeanors, were not lesser and included offenses of felony of obtaining money by false pretenses since misdemeanor statutes require "sale" while felony statute does not; in order for offense to be lesser and included within another offense which is greater, it is necessary that greater offense include every element of lesser offense plus other elements; although conduct might also have been chargeable under misdemeanor statutes, defendant was properly charged with felony of obtaining money or property by false pretenses since state has discretionary power to choose under which law it will charge a defendant and fact that there is an area in which two statutes overlap in prohibiting same act does not mean that defendant can only be prosecuted under the statute providing the lesser penalty. State v. Lagerquist, — M —, 445 P 2d 910.

No Fatal Variance

The information charged defendant with obtaining money from a bank by false pretenses. The evidence showed that the bank had made a loan to him on his false representations that he was the owner of a large amount of property, he drawing checks on the amount of his note placed to his credit. Held, that there was no fatal variance between the allegations of the information and the evidence. State v. Mason, 62 M 180, 186, 188, 204 P 358.

Operation and Effect

When a county officer is charged with collecting illegal fees by presenting a claim under the name of another to the county for work which was within his duties as county surveyor, the public policy of this state under section 94-5516 is that, as a matter of defense, the county officer is entitled to offer evidence of his good faith or honest mistake and the value received by the county. State v. Hale, 126 M 326, 249 P 2d 495, 496.

Proof Necessary for Conviction

To convict of the crime of obtaining property by false pretenses, the prosecution must allege and prove the making by the accused to the person defrauded of one or more representations of past events or existing facts; that such person believed the representations to be true and, relying thereon, parted with money or property which was received by the accused; that the representations were false and were made knowingly and designedly with intent to defraud such person. State v. Bratton, 56 M 563, 186 P 327.

To constitute the crime of obtaining

To constitute the crime of obtaining money by false pretenses, denounced by this section, the accused must have made such representations of past events or existing facts to the injured person knowing them to be false when he made them, that the defrauded party believed them to be true and, relying thereon, parted with money or property which was received by the accused, and that the latter intended to defraud the accuser. State v. Woolsey, 80 M 141, 155, 259 P 826.

Sufficiency of Evidence

Evidence among other facts presented in a prosecution charging defendant with obtaining possession of a valuable horse by false pretenses while acting as the supposed agent of a fictitious buyer, causing the horse to be shipped to a neighboring state where such buyer was unknown, the transaction being based upon simulated correspondence and culminating in the giving of a check for \$260 bearing the signature of the spurious buyer unknown by the Montana bank upon which

it was drawn, held sufficient to warrant a judgment of conviction. State v. Hanks, 116 M 399, 402, 153 P 2d 220.

Evidence that defendant exchanged bank draft in amount of \$800 for victim's car when defendant had only \$300 in bank was sufficient to sustain conviction for obtaining property by false pretenses even though victim never transferred automobile title to defendant. State v. Love, 151 M 190, 440 P 2d 275.

When Crime Complete

The crime of attempting to obtain money by false pretense is complete whenever the false representation is made, with the requisite criminal intent, under such circumstances that, if the thing of value had been obtained, a deprivation would have been the result; the information need not allege that the person attempted to be defrauded believed the representation, nor that the fraud was completed. State v. Phillips, 36 M 112, 117, 92 P 299.

Collateral References

tenses, § 12 et seq.

False Pretenses ⊕7 (1-5). 35 C.J.S. False Pretenses § 1 et seq. 32 Am. Jur. 2d 184 et seq., False Pre-

Telephone conversation as false pretense. 8 ALR 656.

Obtaining money for goods not intended to be delivered as false pretense. 17 ALR 199.

Presentation of and attempt to establish fraudulent claim against governmental agency. 21 ALR 180.

Nature of pretense on which prosecution for obtaining loan or renewal thereof by false pretenses may be based. 24 ALR 397 and 52 ALR 1167.

Intent to defraud as element of offense of false pretense through means of worthless check or draft. 35 ALR 346 and 174 ALR 173.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations. 128 ALR 1520.

Criminal offense of obtaining money under false pretenses predicated upon receipt or claim of benefits under insurance policy. 135 ALR 1157.

Criminal offense of obtaining property by false pretenses predicated upon transactions incident to raising of funds for benevolent or charitable purposes. 145 ALR 302.

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses. 20 ALR 2d 1266.

False representations as to income, profits, or productivity of property as fraud. 27 ALR 2d 14.

94-1806. (11411) Confidence games. Every person who obtains or attempts to obtain from another any money or property, by means or use of brace faro, or any false or worthless checks, or by any other means, artifice, device, instrument or pretense, commonly called confidence games or bunco, is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 934, Pen. C. 1895; re-en. Sec. 8684, Rev. C. 1907; re-en. Sec. 11411, R. C. M. 1921.

Application

Where evidence disclosed that all the defendant did to induce the complaining witness to give him the ring, was, after she had broached the subject of oil wells, to say, in effect, that he had an oil well in Louisiana from which he received \$800 a month income, and that he would cut her in for \$200 of that income. The jury could assume such statements were false, since, according to the complaining witness, neither the first \$200 due July 15th, nor any other was ever paid to her. Defendant should have been prosecuted under section 94-1805 "obtaining money or property by false pretenses," not under this section "confidence games." State v. Allen, 128 M 306, 275 P 2d 200, 205. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

Confidence or Bunco Game

It is a crime to obtain or attempt to obtain money by the use of a confidence game. State v. Hale, 134 M 131, 328 P 2d 930, 934.

Construction of Statute

The element of confidence must be present in order to maintain an action under this section. State v. Hale, 134 M 131, 328 P 2d 930, 934.

The confidence games described in this section are those whereby an elaborate scheme is developed to play upon the credulity or sympathy or some other trait of the victim. State v. Hale, 134 M 131, 328 P 2d 930, 934.

Essence of Crime

The essence of the crime of "bunco," or confidence game, is deceit and false pretense of which the injured party has no suspicion, upon which he relies and upon the faith of which he parts with his property. State v. Moran, 56 M 94, 182 P 110.

Separate and Distinct Crime

A defendant charged under this section with obtaining property by means of a confidence or bunco game cannot be convicted on evidence which shows that defendant obtained such property "by false or fraudulent representation or pretenses" under section 94-1805, because such crimes are separate and distinct offenses. State v. Allen, 128 M 306, 275 P 2d 200, 201. (Dissenting opinions, 128 M 306, 275 P 2d 200, 205, 206.)

This statute covers a separate and distinct crime from that covered by section 94-2406. State v. Hale, 134 M 131, 328 P

2d 930, 934.

Collateral References

False Pretenses № 16. 35 C.J.S. False Pretenses §§ 4, 32. 32 Am. Jur. 2d 184 et seq., False Pretenses, § 12 et seq.

94-1807. (11412) Selling land twice. Every person who, after once selling, bartering or disposing of any tract of land or town lot, or after executing any bond or agreement for the sale of any land or town lot, again willfully and with intent to defraud previous or subsequent purchasers, sells, barters or disposes of the same tract of land or town lot, or any part thereof, or willfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 137, p. 212, Bannack Stat.; re-en. Sec. 162, p. 307, Cod. Stat. 1871; re-en. Sec. 162, 4th Div. Rev. Stat. 1879; re-en. Sec. 200, 4th Div. Comp. Stat. 1887; amd. Sec. 935, Pen. C. 1895; re-en. Sec. 8685, Rev. C. 1907; re-en. Sec. 11412, R. C. M. 1921. Cal. Pen. C. Sec. 533.

Proof Necessary for Conviction

To make out the offense denounced by this section, it must be alleged and proven: That a sale and conveyance, or an agreement therefor, have been made; that a second sale and conveyance, or an agreement therefor, have been made for a valuable consideration; and that such second sale has been knowingly made, and with a felonious intent to defraud either the first or second purchaser. In re Weed, 26 M 241, 248, 67 P 308.

Right of Private Property.

An essential element of the right of private property is the right to use or dispose of it in any lawful way which does not infringe the rights of others, and apparently the only statutory provision relating to the right of an owner of real property to resell it after a previous sale is this section, which prohibits resale if made with

intent to defraud previous or subsequent purchasers. Thompson v. Lincoln National Life Ins. Co., 114 M 521, 533, 138 P 2d 951.

Collateral References

False Pretenses € 15. 35 C.J.S. False Pretenses §§ 4, 9, 10, 14, 30.

False statement as to matter of record as false pretense within criminal statute. 56 ALR 1217.

94-1808. (11413) Married person selling land under false representations. Every person who falsely represents himself or herself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife or her husband is necessary, and under such representation willfully conveys or mortgages the same, is guilty of a felony.

History: En. Sec. 936, Pen. C. 1895; re-en. Sec. 8686, Rev. C. 1907; re-en. Sec. 11413, R. C. M. 1921. Cal. Pen. C. Sec. 534.

Collateral References

False Pretenses (1). 35 C.J.S. False Pretenses (1), 4, 9, 10, 12, 14, 19.

94-1809. (11414) Mock auction. Every person who obtains any money or property from another, or obtains the signature of another to any written instrument, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property, by auction, or by any of the practices known as mock auctions, is punishable by imprisonment, in the state prison not exceeding three years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment; and in addition thereto, forfeits any license he may hold as auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this state.

History: En. Sec. 937, Pen. C. 1895; re-en. Sec. 8687, Rev. C. 1907; re-en. Sec. 11414, R. C. M. 1921. Cal. Pen. C. Sec. 535.

Collateral References

Auctions and Auctioneers \$13. 7 C.J.S. Auctions and Auctioneers \$17.

94-1810. (11415) Consignee, false statement by. Every commission merchant, broker, agent, factor or consignee who shall willfully and corruptly make or cause to be made to the principal or consignor of such commission merchant, agent, broker, factor or consignee a false statement concerning the price obtained for or the quality or quantity of any property consigned or entrusted to such commission merchant, agent, broker, factor or consignee for sale, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 938, Pen. C. 1895; re-en. Sec. 8688, Rev. C. 1907; re-en. Sec. 11415, R. C. M. 1921. Cal. Pen. C. Sec. 536.

94-1811. (11416) Selling or removing mortgaged property to defraud mortgagee. Every person who, after mortgaging any personal property,

except railroad locomotives, railroad engines, rolling stock of a railroad, steamboat machinery in actual use and vessels, removes or causes to be removed, or permits the removal of such mortgaged property from the county where it was situated at the time it was mortgaged, without the written consent of the mortgagee, with the intent to deprive the mortgagee of his claim thereto and interest therein; and every person who, after mortgaging any personal property of any kind or character whatsoever, voluntarily sells or transfers any such mortgaged property without the written consent of the mortgagee, and with the intent to defraud such mortgagee of his claim thereto and interest therein, or with the intent to defraud the purchaser thereof, of any money or thing of value, is guilty of larceny.

History: En. Sec. 939, Pen. C. 1895; amd. Sec. 1, Ch. 72, L. 1905; re-en. Sec. 8689, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1909; re-en. Sec. 11416, R. C. M. 1921. Cal. Pen. C. Sec. 538.

Requisite Intent

To constitute the act of removing mortgaged chattels from the county, where they were at the time the mortgage was given, a crime, it was necessary that the removal be made with the intent of depriving the mortgagee of his claim thereto or interest therein. Averill Machinery Co. v. Taylor, 70 M 70, 79, 223 P 918.

Collateral References

Chattel Mortgages ≈ 230.

14 C.J.S. Chattel Mortgages §§ 280, 281.

15 Am. Jur. 2d 400-402, Chattel Mortgages, §§ 242, 243.

Conditional sale of personal property as creating or reserving a "lien" within criminal statute prohibiting acts tending to prevent enforcement of lien, 153 ALR 919

94-1812. (11416.1) Conditional sale or lease—removal, sale or concealment of property to defraud vendor or lessor—larceny. Every person who, having come into possession of any personal property under a conditional sale contract or lease under the terms of which the title to said personal property remains in the vendor or lessor, except locomotives, engines, rolling stock of a railroad, steamboat machinery and vessels in actual use, and who, not having fully complied with the conditions of said contract or lease, shall sell or dispose of such property, or any part thereof, without first obtaining the written consent of the vendor or lessor under such contract or lease, or shall remove or cause to be removed such property, or any part thereof, out of the state of Montana without first obtaining the written consent of the vendor or lessor under such contract or lease, or shall conceal such property within the state of Montana from said vendor or lessor and refuse to deliver possession thereof after default and demand for possession by said vendor or lessor, if such sale, removal or concealment be made with intent to deprive the vendor of his claim to said property or interest therein, shall be guilty of larceny, and shall be punished in the same manner and to the same extent as for larceny of property so removed, concealed or disposed of.

History: En. Sec. 1, Ch. 108, L. 1933.

94-1813. (11417) False pedigree of animals, etc. Every person who makes, publishes, delivers or uses any false or fraudulent pedigree of any horse, cattle, sheep or other domestic animal for the purpose of increasing the value of the animal is punishable by a fine not exceeding five hundred dollars.

History: Ap. p. Sec. 80, 5th Div. Comp. re-en. Sec. 8690, Rev. C. 1907; re-en. Sec. Stat. 1887; en. Sec. 940, Pen. C. 1895; 11417, R. C. M. 1921.

94-1814. (11418) Selling animal with false pedigree. Every person who by statements or representations concerning a false or fraudulent pedigree sells to another any domestic animal and such animal is not of the breeding or pedigree as represented, is punishable by a fine not exceeding fifty dollars, and is liable to the purchaser in a civil action for double the value or price paid for the animal.

History: Ap. p. Sec. 81, 5th Div. Comp. re-en. Sec. 8691, Rev. C. 1907; re-en. Sec. Stat. 1887; re-en. Sec. 941, Pen. C. 1895; 11418, R. C. M. 1921.

94-1815. (11419) Use of false pretenses in selling mines. Every person who, with intent to cheat, wrong, or defraud, places in or upon any mine or mining claim any ores or specimens of ores not extracted therefrom, or exhibits any ore, or certificate of assay of ore not extracted therefrom, for the purpose of selling any mine or mining claim, or interest therein, or who obtains any money or property by any such false pretenses or artifices, is guilty of a felony.

History: En. Sec. 942, Pen. C. 1895; re-en. Sec. 8692, Rev. C. 1907; re-en. Sec. 11419, R. C. M. 1921.

94-1816. (11420) Interference with samples for assay. Every person who interferes with, or in any manner changes samples of ores or bullion produced for sampling, or changes or alters samples or packages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying with intent to cheat, wrong, or defraud, is guilty of a felony.

History: En. Sec. 943, Pen. C. 1895; re-en. Sec. 8693, Rev. C. 1907; re-en. Sec. 11420, R. C. M. 1921.

94-1817. (11421) Making false samples of ore. Every person who, with intent to cheat, wrong, or defraud, makes or publishes a false sample of ore or bullion, or who makes or publishes, or causes to be published a false assay of ore or bullion, is guilty of a felony.

History: En. Sec. 944, Pen. C. 1895; re-en. Sec. 8694, Rev. C. 1907; re-en. Sec. 11421, R. C. M. 1921.

94-1818. (11422) False advertising defined. False advertising as used in this act shall mean any false statement regarding the quality or price of goods, wares or merchandise, in any advertisement, circular, letter, poster, handbill, display card, or other written or printed matter, by means of which such goods, wares or merchandise are offered for sale to the public.

History: En. Sec. 1, Ch. 117, L. 1915; Collateral References re-en. Sec. 11422, R. C. M. 1921. 32 Am. Jur. 2d 230, False Pretenses, \$88.

94-1819. (11423) False statements regarding merchandise. It shall be unlawful for any person, corporation, copartnership, or association of individuals to make any false statement regarding the quality or price of goods, wares or merchandise in any advertisement, circular, letter, poster, hand-

bill, display card, or other written or printed matter, by means of which such goods, wares or merchandise are offered for sale to the public.

History: En. Sec. 2, Ch. 117, L. 1915; re-en. Sec. 11423, R. C. M. 1921.

94-1820. (11424) Penalty for violation of act. Any person violating any of the provisions of this act by means of false advertising, as herein defined, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 117, L. 1915; re-en. Sec. 11424, R. C. M. 1921.

Collateral References
False Pretenses 54.
35 C.J.S. False Pretenses § 56.

94-1821. (11425) Fakers—definition and punishment. Any person who shall sell or attempt to sell any articles, goods, wares or merchandise of any kind upon the streets of any city or town by means of any false representations, trick, device, or lottery, or by means of any game of chance, for the purpose and with intent to obtain a greater or better price for such article or goods than their actual retail price or value upon the market, shall be deemed a faker, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten days nor more than fifty days.

History: En. Sec. 1, Ch. 116, L. 1915; re-en. Sec. 11425, R. C. M. 1921.

94-1822. Inducing engagement as an advertising agency for sale of real property by misrepresentation of fact concerning services—penalty. Any person engaged or purporting to be engaged as an advertising agency for real property who accepts or solicits money or other considerations for himself or for any other person, in connection with the execution by an owner of real property of any contract whereby such owner authorizes such person to serve as an advertising agency for the sale of such property, and who for the purpose of inducing the owner of such property to enter into such a contract makes or procures the making of any oral or written representation of fact with respect to the nature or extent of the services to be rendered for or on behalf of such owner by any such person under such contract, with reasonable ground for belief that such representation is not true, or who refrains from disclosing to such owner, any matter of fact pertinent to the nature or extent of the services to be rendered for or on behalf of such owner by any such person under such contract is guilty of a felony and shall be imprisoned for not less than one (1) year nor more than five (5) years.

History: En. Sec. 1, Ch. 125, L. 1959.

Cross-Reference

Real Estate License Act to be construed as supplemental to this section, sec. 66-1946.

Collateral References

32 Am. Jur. 2d 230, False Pretenses, § 88.

94-1823. Unlawful to obtain credit, goods, or service by false use of credit device. It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or services, by the use of any false, fictitious, counterfeit or expired credit card, telephone number, credit number or other credit device, or by the use of any credit card, telephone number, credit number or other credit device of another without the authority of the person to whom such card, number or device was issued, or by the use of any credit card, telephone number, credit number or other credit device in any case where such card, number or device has been revoked and notice of revocation has been given to the person to whom issued.

History: En. Sec. 1, Ch. 185, L. 1965.

Collateral References

False Pretenses 1 et seq.

35 C.J.S. False Pretenses § 1 et seq. 32 Am. Jur. 2d 180 et seq., False Pretenses, § 1 et seq.

94-1824. Unlawful to obtain communication service without intention to pay. It shall be unlawful for any person to obtain or attempt to obtain, by the use of any fraudulent scheme, device [,] means or method, telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities with intent to avoid payment of charges therefor.

History: En. Sec. 2, Ch. 185, L. 1965.

94-1825. Theft or unlawful retention of credit device. It shall be unlawful for any person to steal, take or remove a credit card or credit device from the person or possession of the person to whom issued, or, to retain or secrete a credit card or credit device without the consent of the person to whom issued, with the intent of using, delivering, circulating or selling or causing said card or device to be used, delivered, circulated or sold without the consent of the person to whom issued.

History: En. Sec. 3, Ch. 185, L. 1965.

94-1826. Unlawful possession of counterfeit or stolen credit device. It shall be unlawful for any person to have in his possession or under his control or to receive from another person any forged, altered, counterfeited, fictitious or stolen credit card or credit device with the intent to use, deliver, circulate or sell the same, or to permit or cause to procure the same to be used, delivered, circulated or sold, knowing the same to be forged, altered, counterfeited, fictitious or stolen.

History: En. Sec. 4, Ch. 185, L. 1965.

94-1827. Notice may be in person or in writing. The word "notice" as used in section 94-1823 shall be construed to include either notice given in person or notice given in writing to the person to whom the number, card or device was issued.

History: En. Sec. 5, Ch. 185, L. 1965.

94-1828. Use of false device as evidence of knowledge of falsity. The presentation or use of a false, fictitious, counterfeit, expired, unauthorized or revoked credit card, telephone number, credit number or other credit device for the purpose of obtaining credit or the privilege of making a

deferred payment for the article or service purchased shall be evidence of knowledge that the said credit device is false, fictitious, counterfeit, expired, or its use is unauthorized or revoked.

History: En. Sec. 6, Ch. 185, L. 1965.

94-1829. Credit device violation as misdemeanor or felony. Any person who violates any provision of sections 94-1823, 94-1824, 94-1825 or 94-1826 shall be guilty of a misdemeanor, punishable as provided by law therefor; provided, however, that if the value of the goods or services obtained through a violation of the provisions of section 94-1823 or 94-1824 amounts to the sum of fifty dollars (\$50) or more, or if the value of the goods or services obtained through a series of violations of section 94-1823 or 94-1824 committed within a period not exceeding six (6) months amounts in the aggregate to the sum of \$50.00 or more, any such violation or violations shall constitute a felony and shall be punishable as provided by law therefor.

History: En. Sec. 7, Ch. 185, L. 1965.

94-1830. Communications originating or terminating in state. Sections 94-1823 and 94-1824 shall apply when the telephone or telegraph service or message, signal or other communications by telephone or telegraph or over telephone or telegraph facilities either originates or terminates, or both originates and terminates in this state.

History: En. Sec. 8, Ch. 185, L. 1965.

- 94-1831. Obtaining accommodations with intent to defraud. (1) Any person who, with intent to defraud, obtains food, lodging or other accommodations at any hotel, apartment house, inn, rooming or boarding house, tourists' campground, mobile home park, motel, hospital, restaurant or cafe, or who, after having obtained such food, lodging or other accommodations at any such place, surreptitiously removes his baggage and clothing from the place, without first paying or tendering payment for the food, lodging or other accommodations, is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding three (3) months or by a fine not exceeding one hundred dollars (\$100), or both.
- (2) Proof of any of the following facts is prima facie evidence of the fraudulent intent referred to in subsection (1) of this act:
- (a) Lodging, food or other accommodations were obtained by false pretense or by false or fictitious show or pretense of any baggage or other property.
- (b) The person failed or refused to pay for the food, lodging or other accommodations upon demand.
- (c) The person made, drew and gave in payment for the food, lodging or other accommodations any check or draft on which payment was refused.
- (d) The person departed without paying or offering to pay for the food, lodging or other accommodations.

(e) The person surreptitiously removed or attempted to remove his baggage.

History: En. Sec. 1, Ch. 135, L. 1967.

Collateral References

32 Am. Jur. 2d 205, False Pretenses, § 48.

CHAPTER 19

FALSE WEIGHTS AND MEASURES

Section 94-1901. False weight and measure defined. 94-1902. Using false weights or measures.

94-1903. Stamping false weight, etc., on casks or packages. 94-1904. Weight by the ton or pound.

94-1901. (11428) False weight and measure defined. A false weight or measure is one which does not conform to the standard established by the laws of the United States of America.

History: En. Sec. 960, Pen. C. 1895; re-en. Sec. 8700, Rev. C. 1907; re-en. Sec. 11428, R. C. M. 1921. Cal. Pen. C. Sec. 552.

Cross-References

Adding extraneous substance to increase weight, penalty, sec. 94-35-171.

False receipts by public weigher, sec. 16-1113.

Collateral References

Weights and Measures 10. 94 C.J.S. Weights and Measures § 9. 56 Am. Jur. 1041 et seq., Weights, Measures, and Labels, § 45 et seq.

94-1902. (11429) Using false weights or measures. Every person who uses any weight or measure, knowing it to be false, by which another is defrauded or otherwise injured, is guilty of a misdemeanor.

History: En. Sec. 961, Pen. C. 1895; re-en. Sec. 8701, Rev. C. 1907; re-en. Sec. 11429, R. C. M. 1921, Cal. Pen. C. Sec. 553.

False Pretenses

Crimes under Packaged Commodities Offered for Sale Act (90-601 et seq., since repealed) and under False Weights and Measures Act (94-1901 et seq.), both misdemeanors, were not lesser and included offenses of felony of obtaining money by false pretenses since misdemeanor statutes require "sale" while felony statute does not; in order for offense to be lesser and included within another offense which is greater, it is necessary that greater offense include every element of lesser offense plus other elements; although defendant's con-

duct might have been chargeable under misdemeanor statutes, charge of obtaining money or property by false pretenses, a felony, was nonetheless proper since state has discretionary power to choose under which law it will charge a defendant and fact that there is an area in which two statutes overlap in prohibiting same act does not mean that defendant can only be prosecuted under the statute providing the lesser penalty. State v. Lagerquist, — M —, 445 P 2d 910.

Collateral References

Construction of statute or ordinance with respect to net weight or capacity of containers. 35 ALR 785.

94-1903. (11430) Stamping false weight, etc., on casks or packages. Every person who knowingly marks or stamps false or short weight or measure, or false tare, on any cask or package, or knowingly sells or offers for sale, any cask or package so marked, is guilty of a misdemeanor.

History: En. Sec. 962, Pen. C. 1895; re-en. Sec. 8702, Rev. C. 1907; re-en. Sec. 11430, R. C. M. 1921. Cal. Pen. C. Sec. 554.

94-1904. (11431) Weight by the ton or pound. In all sales of coal, hay and other commodities, usually sold by the ton or fractional part thereof, the seller must give to the purchaser full weight, at the rate of two thousand pounds to the ton; and in all sales of articles which are sold in commerce by avoirdupois weight, the seller must give to the purchaser full weight, at the rate of sixteen ounces to the pound; and any person violating this section is guilty of a misdemeanor.

History: En. Sec. 963, Pen. C. 1895; re-en. Sec. 8703, Rev. C. 1907; re-en. Sec. 11431, R. C. M. 1921. Cal. Pen. C. Sec. 555.

Collateral References
Weights and Measures 5.
94 C.J.S. Weights and Measures § 4.

Cross-Reference

Full weight of coal required, sec. 84-1410.

CHAPTER 20

FORGERY AND COUNTERFEITING

Section 94-2001. Forgery of wills, conveyances, etc. 94-2002. Making false entries in records or returns. Forgery of public or corporate seal. Punishment of forgery. 94-2003. 94-2004. 94-2005. 94-2006. Forging telegraphic messages. Possessing or receiving forged or counterfeit bills or notes with intent to defraud-penalty. Making, passing or uttering fictitious bills, etc. 94-2007. 94-2008. 94-2009. 94-2010. Counterfeiting coin, bullion, etc. Punishment of counterfeiting. Possessing or receiving counterfeit coin, bullion, etc. 94-2011. Making or possessing counterfeit dies or plates. 94-2012. Counterfeiting railroad tickets, etc. 94-2013. Restoring canceled tickets. 94-2014. Production of false identification documents.

94-2001. (11355) Forgery of wills, conveyances, etc. Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, covenant, bank bill or note, postnote, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any auditor's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money or the delivery of goods or chattels of any kind, or for the delivery of any instrument in writing or acquittance, release or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another on any official certificate, or utters, publishes, or passes or attempts to pass as true and genuine any of the above-named false, altered, forged, or counterfeited matters as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person, or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of any court, or the return of any officer to any process of any court, is guilty of forgery.

History: Ap. p. Sec. 76, p. 194, Bannack Stat.; re-en. Sec. 88, p. 287, Cod. Stat. 1871; re-en. Sec. 88, 4th Div. Rev. Stat. 1879; re-en. Sec. 96, 4th Div. Comp. Stat. 1887; en. Sec. 840, Pen. C. 1895; re-en. Sec. 8629, Rev. C. 1907; re-en. Sec. 11355, R. C. M. 1921. Cal. Pen. C. Sec. 470.

Cross-References

State tax stamps, counterfeiting, sec. 94-35-260.

Trade-marks, forgery, secs. 94-35-226 to 94-35-236.

Act Committed by Indian on Indian Reservation

State court was without jurisdiction to try Indian for forgery of check which he attempted to cash on a store located within the boundaries of an Indian reservation. The defendant was still a ward of the federal government and under the exclusive jurisdiction of federal government for all acts and crimes defined and made punishable by the laws of Congress, when committed within the exterior boundaries of an Indian reservation. State exrel. Bokas v. District Court, 128 M 37, 270 P 2d 396.

Allegation of Making; Proof of Altering

One charged with forgery in fraudulently making an instrument cannot be proved guilty by showing that he altered the same. State v. Mitten, 36 M 376, 382, 92 P 969.

Essential Elements

The essential elements of forgery are: A false making of an instrument in writing; a fraudulent intent, and a writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability. State v. Alexander, 73 M 329, 332, 236 P 542; State v. Cooper, 146 M 336, 406 P 2d 691; State v. Phillips, 147 M 334, 412 P 2d 205.

To constitute the crime of forgery there must have been a false writing, the intent to defraud, and it must appear that the instrument, if genuine, would have validity, i. e., if genuine, it would expose a particular person to legal process, apparent legal efficiency being sufficient. Exparte Solway, 82 M 89, 93, 265 P 21.

General Intent

The intent required under this section, as controlled by section 94-105, has to be

a general intent only. State v. Cooper, 146 M 336, 406 P 2d 691.

Instrument Must Be Legally Valid

To constitute forgery, the instrument, alleged to have been forged, must be one which, if genuine, would have legal validity; hence, if an instrument, though falsely made, shows upon its face that it has no legal validity, it cannot be made the basis of a charge of forgery. State v. Evans, 15 M 539, 541, 39 P 850; In re Farrell, 36 M 254, 260, 92 P 785. See also County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81, and American Bonding Co. v. State Savings Bank, 47 M 332, 337, 133 P 367.

A juror's certificate, which did not bear the seal required by the statute, did not constitute a legal liability against the county, and, being void on its face, a charge of forgery could not be predicated upon it. In re Farrell, 36 M 254, 266, 92 P 785. See also County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81, and American Bonding Co. v. State Savings Bank, 47 M 332, 337, 133 P 367. Compare Choate v. Spencer, 13 M 127, 132, 32 P 651; Sharman v. Huot, 20 M 555, 557, 52 P 558; Kipp v. Burton, 29 M 96, 103, 74 P 85.

Non-negotiable Instruments

Fact that a warrant is non-negotiable does not affect question as to whether one who passes it when containing a known forged endorsement is guilty of forgery. State v. Phillips, 127 M 381, 264 P 2d 1009, 1011.

Passing of Auditor's Warrant

The statute when speaking of endorsements while not specifically mentioning auditors' warrants does cover "orders." The endorsement of an auditor's warrant amounts to the endorsement of an order within the meaning of the statute. State v. Phillips, 127 M 381, 264 P 2d 1009, 1011.

Substantial Evidence

Where it was shown at trial that defendant did not know checks paid to him for fixing car were forged, combined evidence was not substantial enough to overcome the presumption of innocence in proving that defendant had a fraudulent intent at the time he cashed the checks. State v. Phillips, 147 M 334, 412 P 2d 205

Sufficiency of Alteration

The changing of an order for school supplies by detaching a portion thereof so as to create, out of what was not intended as a promissory note, a negotiable instrument, is such a material alteration of the original instrument as to constitute a forgery, if done with a criminal intent. State v. Mitton, 37 M 366, 376, 96 P 926. See First Nat. Bank of Miles City v. Barrett, 52 M 359, 365, 157 P 951.

Sufficiency of Charge

An information charging the forgery of an endorsement of a certificate of deposit, which was set out in full in the information and contained the words "H. D. & Co., Bankers" at the top and above the date, and was signed "H. D. & Co." and was made payable to the order of the depositor, is sufficient, although no bank is referred to in the information, and there is no allegation therein of extrinsic facts to show that "H. D. & Co." had any bank in which money was deposited. State v. Patch, 21 M 534, 536, 55 P 108.

It is necessary that the information shall set forth the particulars in which the instrument is alleged to have been altered, in order that the trial court may say, as a matter of law, whether the alteration is of such a character as to constitute the crime of forgery. State v. Mitten, 36 M 376, 382, 92 P 969.

Where the information charging forgery in alleging criminal intent on the part of the defendant names a number of persons as having been defrauded, among them the bank upon which the check in question was drawn and which paid it, and the person to whom it was given in payment of a debt, neither one of whom could be damaged because the signature was genuine, proof that the remaining two suffered loss was sufficient to justify a verdict of guilty; under such circumstances the allegation as to the first two may be disregarded as surplusage. State v. Daems, 97 M 486, 497, 37 P 2d 322.

Testimony of Person Forging Endorsement as Corroboration

Testimony of person who forged endorsement on warrant and who was not implicated in matter of passing or uttering instrument is corroborating evidence to the testimony of an accomplice of the defendant charged with uttering the forged instrument, since person who forged endorsement is not an accomplice to defendant who uttered instrument as the making of the instrument and the uttering of it are two separate crimes although they both constitute forgery. State v. Phillips, 127 M 381, 264 P 2d 1009, 1014. (See, however, the dissenting opinions in 127 M 381, 264 P 2d 1009, 1016, 1018.)

Unnecessary for Instrument to Create Civil Liability

It is not necessary that the forged instrument should create civil liability before it can be held to be forgery. State v. Phillips, 127 M 381, 264 P 2d 1009, 1011.

Uttering Forged Instrument

"Uttering" a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. State v. Cooper, 146 M 336, 406 P 2d 691.

One possessed of fraudulent intent who either writes a forged instrument, or who knowingly utters a forged instrument, each act being separate and distinct from the other, or who commits both acts, is guilty of forgery. State v. Cooper, 146 M 336, 406 P 2d 691.

What Constitutes a Sufficient Forgery

Since the acts constituting forgery as stated in this section are in the disjunctive, any one of the acts named, if done with the intent to defraud another, constitutes the crime; hence where one forges a cheek, with such intent, he is guilty of forgery even though he makes no attempt to publish, utter or pass it; and endorsement on a cheek being no part of the instrument, it is immaterial that a forged check was not endorsed. Ex parte Solway, 82 M 89, 93, 265 P 21.

What Does Not Constitute

A bank in this state had in its possession travelers' checks which it held in trust for a New York bank with authority to sell them under agreement to immediately remit the price to the latter bank. An officer of the former, who had authority to do so, issued one of the checks when the bank was insolvent without requiring the purchaser to pay therefor or remitting the price. Held, that since the officer issuing the check, which the New York bank was compelled to pay, was authorized to "make" the writing by inserting the date, the amount and the name of the selling bank, and the purchaser who signed it was a real and not a fictitious person, there was no false making of the instrument and the information charging the officer with forgery was properly dismissed on general demurrer. State v. Alexander, 73 M 329, 332, 236 P 542.

What May Be Forged

A city warrant, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor and countersigned by the city clerk, for the payment of moneys out of a specific fund, is a draft, and is therefore the subject of forgery under a statute making it a

forgery to "falsely make, alter, forge, or counterfeit any writing obligatory, draft," etc. State v. Brett, 16 M 360, 369, 40 P

When Just the Passing of a Forged Instrument May Be Forgery

To justify a conviction of one charged with uttering a note while knowing it to be forged, it is not necessary to show that the forgery in the first instance was committed by the defendant. If, knowing that the instrument was in fact a forgery, he passed it as true and genuine with a felonious intent, he is guilty of forgery. State v. Mitton, 37 M 366, 372, 96 P 926. See First Nat. Bank of Miles City v. Barrett, 52 M 359, 365, 157 P 951.

Collateral References

Forgery € 7 (1-5). 37 C.J.S. Forgery § 17 et seq. 36 Am. Jur. 2d 696, Forgery, § 27.

Aliens, collateral attack on ground of forgery on order admitting to citizenship. 6 ALR 410.

Experiments to show erasure of writing by use of chemicals. 8 ALR 40.

Government's right to recover money paid on forged drafts drawn upon it. 10 ALR 1406.

Entrapment to commit the offense of passing forged instrument. 18 ALR 179; 66 ALR 506 and 86 ALR 272.

Filing affidavit of forgery against an-

cient deed. 18 ALR 908.

Receipt, canceled check, or other voucher, alteration of, as forgery. 26 ALR 1058. Filling in blanks in paper in terms other

than authorized as forgery. 87 ALR 1169. Alteration of written instrument in order to conform to actual intention as

forgery. 93 ALR 864.

Public records as notice of facts starting running of statute of limitations against action based on forgery. 137 ALR

Invalid instrument as subject of forgery. 174 ALR 1300.

Fictitious or assumed name, use of. 49 ALR 2d 852.

Alteration of figures indicating amount of check, bill, or note without change in written words, as forgery. 64 ALR 2d

Procuring signature by fraud as forgery. 11 ALR 3d 1074.

94-2002. (11356) Making false entries in records or returns. Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

History: En. Sec. 841, Pen. C. 1895; re-en. Sec. 8630, Rev. C. 1907; re-en. Sec. 11356, R. C. M. 1921. Cal. Pen. C. Sec. 471.

Collateral References Forgery \$\infty\$15. 37 C.J.S. Forgery § 20 et seq. 36 Am. Jur. 2d 697, Forgery, § 28.

94-2003. (11357) Forgery of public or corporate seal. Every person who, with intent to defraud another, forges or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in possession any such counterfeited seal, or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

History: Ap. p. Sec. 86, p. 197, Bannack Stat.; re-en. Sec. 98, p. 290, Cod. Stat. 1871; re-en. Sec. 98, 4th Div. Rev. Stat. 1879; re-en. Sec. 106, 4th Div. Comp. Stat. 1887; en. Sec. 842, Pen. C. 1895; re-en. Sec. 8631, Rev. C. 1907; re-en. Sec. 11357, R. C. M. 1921. Cal. Pen. C. Sec. 472.

(11358) Punishment of forgery. Forgery is punishable by 94-2004. imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 843, Pen. C. 1895; re-en. Sec. 8632, Rev. C. 1907; re-en. Sec. 11358, R. C. M. 1921, Cal. Pen. C. Sec. 473.

94-2005. (11359) Forging telegraphic messages. Every person who knowingly and willfully sends by telegraph to any person a false or forged message, purporting to be from such telegraph office, or from any other person, or who willfully delivers or causes to be delivered to any person any such message, falsely purporting to have been received by telegraph, or who furnishes or conspires to furnish, or causes to be furnished to any agent, operator, or employee, to be sent by telegraph or to be delivered, any such message, knowing the same to be forged or false, with intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 844, Pen. C. 1895; re-en. Sec. 8633, Rev. C. 1907; re-en. Sec. 11359, R. C. M. 1921. Cal. Pen. C. Sec. 474.

Collateral References

Telecommunications ≥ 362. 86 C.J.S. Telegraphs, Telephones, Radio, and Television § 115.

94-2006. (11360) Possessing or receiving forged or counterfeit bills or notes with intent to defraud—penalty. Every person who has in his possession, or receives from another person, any forged promissory note, or bank bill, or bills for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up or complete such blank and unfinished note or bill, or to permit or cause or procure the same to be filled up and completed, in order to utter or pass the same, or to permit or cause or procure the same to be passed, or to defraud any person, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: Ap. p. Sec. 81, p. 195, Bannack Stat.; re-en. Sec. 93, p. 289, Cod. Stat. 1871; re-en. Sec. 93, 4th Div. Rev. Stat. 1879; re-en. Sec. 101, 4th Div. Comp. Stat. 1887; en. Sec. 845, Pen. C. 1895; re-en. Sec. 8634, Rev. C. 1907; re-en. Sec. 11360, R. C. M. 1921. Cal. Pen. C. Sec. 475.

Collateral References

Counterfeiting 11; Forgery 17.
20 C.J.S. Counterfeiting § 13 et seq.;
37 C.J.S. Forgery § 38.
20 Am. Jur. 2d 372, Counterfeiting, § 3.

Government's right to recover money paid on forged drafts drawn upon it. 10 ALR 1406.

Alteration of receipt, canceled check, or other voucher as forgery. 26 ALR 1058. Effect of promise by one whose name is forged to take care of paper. 48 ALR

94-2007. (11361) Making, passing or uttering fictitious bills, etc. Every person who makes, passes, utters, or publishes with intention to defraud any other person, or who, with like intention, attempts to pass, utter, or publish any fictitious bill, note, or cheek, purporting to be the bill, note, or cheek, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, government, or individual in existence, when in fact there is no such bank, corporation, copartnership, government, or individual in existence, knowing the bill, note, cheek, or instru-

ment in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: Ap. p. Sec. 82, p. 196, Bannack Stat.; re-en. Sec. 94, p. 289, Cod. Stat. 1871; re-en. Sec. 94, 4th Div. Rev. Stat. 1879; re-en. Sec. 102, 4th Div. Comp. Stat. 1887; en. Sec. 846, Pen. C. 1895; amd. Sec. 1, Ch. 32, L. 1907; re-en. Sec. 8635, Rev. C. 1907; re-en. Sec. 11361, R. C. M. 1921. Cal. Pen. C. Sec. 476.

Jurisdiction of Offense

Enrolled member of Indian tribe was subject to prosecution in state court for forgery where check was obtained from Indian agency office on reservation but was cashed in a town outside boundaries of reservation. Petition of Fox, 141 M 189, 376 P 2d 726, 727.

Crime of forgery is committed in place where the false, forged or counterfeit check is passed as true and genuine and the origin of the check has no bearing upon the crime. Petition of Fox, 141 M 189, 376 P 2d 726.

Passing False Check

Crime of forgery encompasses the pass-

ing of a check as true and genuine when in fact it is false, forged or counterfeit. Petition of Fox, 141 M 189, 376 P 2d 726.

Questions for Jury

Where defendant was charged with uttering and delivering a fictitious check, the intent to defraud and defendant's knowledge of the fictitious character of the check were questions for jury. State v. Johnston, 140 M 111, 367 P 2d 891, 893.

Restitution

It is no defense under this section that defendant has made restitution. State v. Johnston, 140 M 111, 367 P 2d 891, 893.

Collateral References

Counterfeiting 52, 6; Forgery 16. 20 C.J.S. Counterfeiting § 7; 37 C.J.S. Forgery § 37.

20 Am. Jur. 2d 372, Counterfeiting, § 4; 36 Am. Jur. 2d 683 et seq., Forgery, § 3 et seq.

94-2008. (11362) Counterfeiting coin, bullion, etc. Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind of species of gold dust, gold or silver bullion or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

History: Ap. p. Sec. 77, p. 195, Bannack Stat.; re-en. Sec. 89, p. 288, Cod. Stat. 1871; re-en. Sec. 89, 4th Div. Rev. Stat. 1879; re-en. Sec. 97, 4th Div. Comp. Stat. 1887; en. Sec. 847, Pen. C. 1895; re-en. Sec. 8636, Rev. C. 1907; re-en. Sec. 11362, R. C. M. 1921. Cal. Pen. C. Sec. 477.

Collateral References

Counterfeiting \$2, 6. 20 C.J.S. Counterfeiting § 6. 20 Am. Jur. 2d 372, Counterfeiting, § 4. "Similar," meaning of. 17 ALR 96.

"Infamous offense," passing or conspiracy to make counterfeit coin as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1008, 1015.

Postage stamps, counterfeiting of, as a criminal offense. 127 ALR 1469.

Uttering and passing counterfeit obligation or other security of the United States, with intent to defraud, under 18 USC § 472, what constitutes. 3 ALR 3d 1051.

94-2009. (11363) Punishment of counterfeiting. Counterfeiting is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 848, Pen. C. 1895; re-en. Sec. 8637, Rev. C. 1907; re-en. Sec. 11363, R. C. M. 1921. Cal. Pen. C. Sec. 478.

94-2010. (11364) Possessing or receiving counterfeit coin, bullion, etc. Every person who has in his possession, or receives from any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces, or

nuggets, with the intention to sell, utter, or put off, or pass the same, or permits, causes, or produces the same to be sold, uttered, or passed with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: Ap. p. Sec. 78, p. 195, Bannack Stat.; re-en. Sec. 90, p. 288, Cod. Stat. 1871; re-en. Sec. 90, 4th Div. Rev. Stat. 1879; re-en. Sec. 98, 4th Div. Comp. Stat. 1887; en. Sec. 849, Pen. C. 1895; re-en. Sec. 8638, Rev. C. 1907; re-en. Sec. 11364, R. C. M. 1921. Cal. Pen. C. Sec. 479.

94-2011. (11365) Making or possessing counterfeit dies or plates. Every person who makes or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever made use of in counterfeiting coin current in this state, in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine intended for the purpose aforesaid must be destroyed.

History: Ap. p. Sec. 83, p. 196, Bannack Stat.; re-en. Sec. 95, p. 290, Cod. Stat. 1871; re-en. Sec. 95, 4th Div. Rev. Stat. 1879; re-en. Sec. 103, 4th Div. Comp. Stat. 1887; en. Sec. 850, Pen. C. 1895; re-en. Sec. 8639, Rev. C. 1907; re-en. Sec. 11365, R. C. M. 1921. Cal. Pen. C. Sec. 480.

Sufficiency of Information

Information charging unlawful possession of apparatus, paper, etc., used for counterfeiting bank notes held sufficient as against the objection that it merely employed the words of the statute instead

of specifically describing the "apparatus, paper and other things." State v. Shannon, 95 M 280, 284, 26 P 2d 360, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Collateral References

Counterfeiting \$12. 20 C.J.S. Counterfeiting § 19. 20 Am. Jur. 2d 372, Counterfeiting, § 3.

Alteration of written instrument in order to conform to actual intention as forgery. 93 ALR 864.

94-2012. (11366) Counterfeiting railroad tickets, etc. Every person who counterfeits, forges, or alters any check, ticket, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, designated to entitle the holder to ride in the cars of such company, or who utters, publishes, or puts into circulation any such counterfeit or altered ticket, check or order, coupon, receipt for fare, or pass, with intention to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the state prison, or in the county jail, not exceeding one year, or by fine not exceeding one thousand dollars, or both such imprisonment and fine.

History: En. Sec. 851, Pen. C. 1895; re-en. Sec. 8640, Rev. C. 1907; re-en. Sec. 11366, R. C. M. 1921. Cal. Pen. C. Sec. 481.

Collateral References

Carriers \$\insigma 22; Forgery \$\infty 7 (1).
13 C.J.S. Carriers \$\\$ 526, 542, 650; 37
C.J.S. Forgery \$\\$ 17, 18, 20, 22, 24-28,
33-36.
36 Am. Jur. 2d 696, Forgery, \\$ 27.

94-2013. (11367) Restoring canceled tickets. Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates the cuts, marks, punch holes, or other evidences of cancellation, from any ticket, check, coupon,

receipt for fare, or pass issued by any railroad company or any lessee or manager thereof, canceled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessees thereof, or any other person, or who, with like intention to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 852, Pen. C. 1895; re-en. Sec. 8641, Rev. C. 1907; re-en. Sec. 11367, R. C. M. 1921. Cal. Pen. C. Sec. 482.

94-2014. Production of false identification documents. Any person who knowingly procures or assists in the production, procurement, or distribution of any document falsely designating the age or identity of any person shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 169, L. 1967.

CHAPTER 21

FRAUDULENT CONVEYANCES

Section 94-2101. Fraudulent conveyances.

94-2102. Fraudulent removal of property to prevent levy.

94-2103. Knowingly receiving property. 94-2104. Concealment of the effects of insolvent debtor.

94-2101. (11432) Fraudulent conveyances. Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods or chattels or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends the same, or any of them, as true and done, had or made in good faith, or upon good consideration, or aliens, assigns or sells any of the lands, tenements or hereditaments, goods, chattels or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.

History: En. Sec. 134, p. 211, Bannack Stat.; re-en. Sec. 159, p. 306, Cod. Stat. 1871; re-en. Sec. 159, 4th Div. Rev. Stat. 1879; re-en. Sec. 197, 4th Div. Comp. Stat. 1887; amd. Sec. 970, Pen. C. 1895; re-en. Sec. 8704, Rev. C. 1907; re-en. Sec. 11432, R. C. M. 1921, Cal. Pen. C. Sec. 531.

Cross-Reference

Fraudulent conveyances, sec. 29-101 et seq.

Collateral References

Fraudulent Conveyances 329. 37 C.J.S. Fraudulent Conveyances §§ 466, 469.

(11433) Fraudulent removal of property to prevent levy. Every person who, with intent to defraud a creditor, or to prevent any of his property from being made liable for the payment of any of his debts, or from being levied upon by a writ of execution or attachment, removes any of his property or secretes, assigns, conveys, or otherwise disposes of the same, is guilty of a misdemeanor.

History: Ap. p. Sec. 139, p. 212, Bannack Stat.; re-en. Sec. 164, p. 307, Cod. Stat. 1871; re-en. Sec. 164, 4th Div. Rev. Stat. 1879; re-en. Sec. 202, 4th Div. Comp. Stat. 1887; en. Sec. 971, Pen. C. 1895; re-en. Sec. 8705, Rev. C. 1907; re-en. Sec. 11433, R. C. M. 1921.

Collateral References

Fraudulent Conveyances \$329. 37 C.J.S. Fraudulent Conveyances §§ 469, 470.

94-2103. (11434) Knowingly receiving property. Every person who receives any property from another, knowing that the same is transferred or delivered to him in violation of or with intent to violate the last section, is guilty of a misdemeanor.

History: En. Sec. 972, Pen. C. 1895; re-en. Sec. 8706, Rev. C. 1907; re-en. Sec. 11434, R. C. M. 1921.

94-2104. (11435) Concealment of the effects of insolvent debtor. Every person who makes a general assignment of his property for the payment of his debts and willfully conceals any part of his estate or effects, or any book account or any writing relating thereto, or any debt owing him by any person, or who represents in his list of creditors any person to whom he is not indebted, or does any act contrary to the provisions of sections 18-301 to 18-330, is guilty of a misdemeanor.

History: En. Sec. 973, Pen. C. 1895; re-en. Sec. 8707, Rev. C. 1907; re-en. Sec. 11435, R. C. M. 1921.

Collateral References

Fraud \$\infty\$=68. 2 C.J.S. Agency \ 10; 37 C.J.S. Fraud \ 154.

CHAPTER 22

FRAUDULENT DESTRUCTION OF INSURED PROPERTY

Section 94-2201. Repealed.

94-2202. Presenting false proofs upon policy of insurance.

94-2201. (11426) Repealed—Chapter 271, Laws of 1947.

94-2202. (11427) Presenting false proofs upon policy of insurance. Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper or writing, with intent to present or use the same, or allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 951, Pen. C. 1895; re-en. Sec. 8699, Rev. C. 1907; re-en. Sec. 11427, R. C. M. 1921. Cal. Pen. C. Sec. 549.

CHAPTER 23

FRAUDS IN MANAGEMENT OF CORPORATIONS

Section 94-2301. Fraud in publishing false statement of concern. 94-2302. Frauds in subscriptions for stock of corporations. 94-2303. Fraudulent issue of stock, scrip, etc. Frauds in procuring organization, etc., of corporation. Unauthorized use of name in prospectus, etc. Misconduct of directors of stock corporations. 94-2304. 94-2305. 94-2306. 94-2307. Savings bank officer overdrawing his account. 94-2308. Frauds in keeping accounts in books of corporation. Officer of corporation publishing false reports. Officer of corporation to permit an inspection. 94-2309. 94-2310. Officer of railroad company contracting debt in its behalf exceeding 94-2311. its available means. 94-2312. Debt contracted in violation of the last section not invalid. 94-2313. Director of a corporation presumed to have knowledge of its affairs. 94-2314. Director present at meeting, when presumed to have assented to proceedings. 94-2315. Director absent from meeting, when presumed to have assented to proceedings. 94-2316. Foreign corporations. 94-2317. Foreign corporations. 94-2318. Agent of foreign corporation. 94-2319. Corporation not complying with laws. 94-2320. Agent of corporation. 94-2321. Director defined. 94-2322. Mining and oil companies—fraudulent handling of finances. 94-2324. Investigation of complaints. 94-2325. Penalty for violations.

94-2301. (11436) Fraud in publishing false statement of concern. Any person who knowingly makes or publishes any book, prospectus, notice, report, statement, exhibit or other publication of or concerning the affairs, financial condition or property of any corporation, joint stock association, copartnership or individual, which said book, prospectus, notice, report, statement, exhibit or other publication shall contain any material statement which is willfully and knowingly false so as to give a less or greater apparent value to the shares, bonds or property of said corporation, joint stock association, copartnership or individual, or any part of said shares, bonds or property, than said shares, bonds or property, or any part thereof, shall really and in fact possess, shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned for not more than ten years, or fined not more than ten thousand dollars, or shall suffer both said fine and imprisonment.

History: En. Sec. 1, Ch. 131, L. 1907; Sec. 8708, Rev. C. 1907; re-en. Sec. 11436, R. C. M. 1921.

Collateral References
Corporations 569.
19 C.J.S. Corporations §§ 931, 932.
19 Am. Jur. 2d 827 et seq., Corporations, § 1434 et seq.

94-2302. (11437) Frauds in subscriptions for stock of corporations. Every person who signs the name of a fictitious person to any subscription for, or an agreement to take, stock in any corporation, existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding

or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

History: En. Sec. 980, Pen. C. 1895; re-en. Sec. 8709, Rev. C. 1907; re-en. Sec. 11437, R. C. M. 1921. Cal. Pen. C. Sec. 557.

Collateral References Fraud 58. 2 C.J.S. Agency § 10; 37 C.J.S. Fraud

94-2303. (11438) Fraudulent issue of stock, scrip, etc. Every officer, agent or other person in the service of any joint stock company or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who willfully and knowingly, with intent to defraud, either—

8 154.

- 1. Sells, pledges or issues, or causes to be sold, pledged, or issued, signs or executes, or causes to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which said company or corporation exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise, upon its power to create or issue stock or evidence of debt; or,
- 2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer, or ownership of any such share or shares,

is punishable by imprisonment in the state prison not exceeding seven years, or by fine not exceeding three thousand dollars, or both.

History: En. Sec. 981, Pen. C. 1895; re-en. Sec. 8710, Rev. C. 1907; re-en. Sec. 11438, R. C. M. 1921.

94-2304. (11439) Frauds in procuring organization, etc., of corporation. Every officer, agent or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than three nor more than ten years.

History: En. Sec. 982, Pen. C. 1895; re-en. Sec. 8711, Rev. C. 1907; re-en. Sec. 11439, R. C. M. 1921. Cal. Pen. C. Sec. 558.

94-2305. (11440) Unauthorized use of name in prospectus, etc. Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose

name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.

History: En. Sec. 983, Pen. C. 1895; re-en. Sec. 8712, Rev. C. 1907; re-en. Sec. 11440, R. C. M. 1921. Cal. Pen. C. Sec. 559.

- 94-2306. (11441) Misconduct of directors of stock corporations. Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended, either—
- 1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,
- 2. To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,
- 3. To discount or receive any evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payments; or,
- 4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him, or his stock; or,
- 5. To receive from any other stock corporation, in exchange for the shares, notes, bonds or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such corporation, is guilty of a misdemeanor.

History: En. Sec. 984, Pen. C. 1895; re-en. Sec. 8713, Rev. C. 1907; re-en. Sec. 11441, R. C. M. 1921. Cal. Pen. C. Sec. 560.

94-2307. (11442) Savings bank officer overdrawing his account. Every officer, teller, or clerk of any savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note or funds of such bank, is guilty of a misdemeanor.

History: En. Sec. 985, Pen. C. 1895; re-en. Sec. 8714, Rev. C. 1907; re-en. Sec. 11442, R. C. M. 1921. Cal. Pen. C. Sec. 561.

Cross-Reference

Officer of bank overdrawing account, penalty, sec. 5-520.

Collateral References

Banks and Banking \$50. 9 C.J.S. Banks and Banking \$643 et seq. 10 Am. Jur. 2d 207, Banks, \$228.

94-2308. (11445) Frauds in keeping accounts in books of corporation. Every officer, director or agent of any corporation or joint stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or to direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent or member of any corporation or joint stock association who, with intent to defraud, destroys, alters,

mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes, or concurs in making any false entries, or omits, or concurs in omitting to make any material entry in any book of accounts or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than ten years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both imprisonment and fine.

History: En. Sec. 987, Pen. C. 1895; re-en. Sec. 8717, Rev. C. 1907; re-en. Sec. 11445, R. C. M. 1921. Cal. Pen. C. Sec. 563.

94-2309. (11446) Officer of corporation publishing false reports. Every director, officer, or agent of any corporation or joint stock association, who knowingly concurs in making, publishing or posting any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law, in the manner required by law, other than such as are mentioned in this chapter, is guilty of a felony.

History: En. Sec. 988, Pen. C. 1895; re-en. Sec. 8718, Rev. C. 1907; re-en. Sec. 11446, R. C. M. 1921, Cal. Pen. C. Sec. 564.

Operation and Effect

The capital stock of a foreign corporation may consist in whole or in part of something other than money, and the state, having failed, in a prosecution against the cashier and manager of a foreign banking corporation for filing a false report of its affairs, to sustain the burden of proving that the capital stock of the corporation in question had not been paid in money or any other property, an order directing a verdict of acquittal was proper. State v. Clements, 37 M 314, 317, 96 P 498.

94-2310. (11447) Officer of corporation to permit an inspection. Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

History: En. Sec. 989, Pen. C. 1895; re-en. Sec. 8719, Rev. C. 1907; re-en. Sec. 11447, R. C. M. 1921. Cal. Pen. C. Sec. 565.

94-2311. (11448) Officer of railroad company contracting debt in its behalf exceeding its available means. Every officer, agent, or stockholder of any railroad company, who knowingly assents to, or has any agency in contracting any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions, and inclusive of its real estate, is guilty of a misdemeanor.

History: En. Sec. 990, Pen. C. 1895; re-en. Sec. 8720, Rev. C. 1907; re-en. Sec. 11448, R. C. M. 1921. Cal. Pen. C. Sec. 566.

94-2312. (11449) Debt contracted in violation of the last section not invalid. The last section does not affect the validity of a debt created in violation of its provisions, as against the company.

History: En. Sec. 991, Pen. C. 1895; re-en. Sec. 8721, Rev. C. 1907; re-en. Sec. 11449, R. C. M. 1921. Cal. Pen. C. Sec. 567.

94-2313. (11450) Director of a corporation presumed to have knowledge of its affairs. Every director of a corporation or joint stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter.

History: En. Sec. 992, Pen. C. 1895; re-en. Sec. 8722, Rev. C. 1907; re-en. Sec. 11450, R. C. M. 1921. Cal. Pen. C. Sec. 568.

94-2314. (11451) Director present at meeting, when presumed to have assented to proceedings. Every director of a corporation or joint stock association who is present at a meeting of the directors at which any act, proceeding, or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein unless he at the time causes or in writing requires his dissent therefrom to be entered in the minutes of the directors.

History: En. Sec. 993, Pen. C. 1895; re-en. Sec. 8723, Rev. C. 1907; re-en. Sec. 11451, R. C. M. 1921. Cal. Pen. C. Sec. 569.

94-2315. (11452) Director absent from meeting, when presumed to have assented to proceedings. Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein if the facts constituting such violation appear on the records or proceedings of the board of directors and he remains a director of the same company for six months thereafter and does not within that time cause or in writing require his dissent from such illegality to be entered in the minutes of the directors.

History: En. Sec. 994, Pen. C. 1895; re-en. Sec. 8724, Rev. C. 1907; re-en. Sec. 11452, R. C. M. 1921. Cal. Pen. C. Sec. 570.

94-2316. (11453) Foreign corporations. It is no defense to a prosecution for a violation of the provisions of this chapter that the corporation was one created by the laws of another state, government or country, if it was one carrying on business or keeping an office therefor within this state.

History: En. Sec. 995, Pen. C. 1895; re-en. Sec. 8725, Rev. C. 1907; re-en. Sec. 11453, R. C. M. 1921, Cal. Pen. C. Sec. 571.

Collateral References Corporations ← 678. 19 C.J.S. Corporations § 952.

94-2317. (11454) Foreign corporations. Every foreign corporation doing business in this state contrary to the provisions of sections 15-1701 to 15-1708 is guilty of a misdemeanor.

History: En. Sec. 996, Pen. C. 1895; re-en. Sec. 8726, Rev. C. 1907; re-en. Sec. 11454, R. C. M. 1921.

Compiler's Note

Sections 15-1701 to 15-1708, relating to foreign corporations, were repealed by Sec. 143, Ch. 300, Laws 1967. For effective date and application to existing corporations, see sec. 15-22-136 and note.

94-2318. (11455) Agent of foreign corporation. Every person who acts as agent or in any other capacity for a foreign corporation, who has not complied with the provisions of law relating to foreign corporations, is guilty of a misdemeanor.

History: En. Sec. 997, Pen. C. 1895; re-en. Sec. 8727, Rev. C. 1907; re-en. Sec. 11455, R. C. M. 1921.

94-2319. (11456) Corporation not complying with laws. Every corporation which fails to comply with the provisions of law relating to corporations, as prescribed in the code, is guilty of a misdemeanor.

History: En. Sec. 998, Pen. C. 1895; re-en. Sec. 8728, Rev. C. 1907; re-en. Sec. 11456, R. C. M. 1921.

Collateral References

Corporations 526.
19 C.J.S. Corporations §§ 1358-1363.
19 Am. Jur. 2d 827 et seq., Corporations, § 1434 et seq.

94-2320. (11457) Agent of corporation. Every person who acts as an officer, agent or in any other capacity for a corporation which has not complied with the provisions of law, as prescribed in this code, is guilty of a misdemeanor.

History: En. Sec. 999, Pen. C. 1895; re-en. Sec. 8729, Rev. C. 1907; re-en. Sec. 11457, R. C. M. 1921.

94-2321. (11458) Director defined. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law.

History: En. Sec. 1000, Pen. C. 1895; re-en. Sec. 8730, Rev. C. 1907; re-en. Sec. 11458, R. C. M. 1921. Cal. Pen. C. Sec. 572.

- 94-2322. (11458.1) Mining and oil companies—fraudulent handling of finances. For the purposes of this act, the following acts and offenses relative to the handling of the finances of mine and oil operations within the state of Montana shall be deemed fraudulent:
- (a) Failure to expend at least seventy-five per centum (75%) of all money raised from the sale of stock or securities of any other kind or character, from the public in the actual operation and development of the oil and mining property, or in the construction of treating plants, or bona fide payments on the purchase price of state property.
- (b) Failure to apply net earnings from said operations, after deducting only reasonable and legitimate expenses, to either a reserve fund, distribution of dividends, liquidation of bona fide indebtedness or reasonable development of said properties.

(c) The operation of holding companies in such a manner as to deprive the stockholders of the parent company of an equitable interest in the earnings of the parent company.

History: En. Sec. 1, Ch. 199, L. 1935.

94-2323. (11458.2) Application of act. The provisions of this act shall apply to any person, corporation or other form of association now operating, or which shall hereafter operate a mining or oil enterprise, the finances of which are derived in whole or in part from subscription and security sales from the public, and operating within the state of Montana. Provided that the provisions of this act shall not apply to any person, firm, corporation or co-operative association holding a permit in good standing from the state investment department, or securities listed on the New York Stock Exchange, Boston Stock Exchange, the Board of Trade of the City of Chicago. the Chicago Stock Exchange or the New York Curb Exchange.

History: En. Sec. 2, Ch. 199, L. 1935.

94-2324. (11458.3) Investigation of complaints. Any stockholder or creditor of a mining or oil company as heretofore provided in this act who has bona fide reason to believe that the provisions of this act have been violated may complain relative thereto to the attorney general of the state of Montana, the county attorney of the county in which the property is located, or the state investment commissioner, and it shall be incumbent upon the officers heretofore mentioned to make a complete investigation of the records and affairs of said corporation or corporations, and in the event that the facts disclose the violation of the provisions of this act it shall be the duty of the officer to prefer charges against the officers and directors of the corporation or corporations involved.

History: En. Sec. 3, Ch. 199, L. 1935.

(11458.4) Penalty for violations. Any person or the officers or directors of any corporation, co-operative association or any other association of any kind or character found guilty of the violation of the provisions of this act shall be subject to imprisonment in the state prison for a term of not less than ninety (90) days or more than three (3) years or by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1,000.00) or both such fine and imprisonment.

History: En. Sec. 4, Ch. 199, L. 1935.

Collateral References

Associations 27; Corporations 224,

7 C.J.S. Associations § 17; 19 C.J.S. Corporations §§ 931, 932.

CHAPTER 24

GAMBLING

Gambling games prohibited—penalty—license fees for card tables. Section 94-2401.

Licenses-application-expiration. 94-2402. 94-2403. Organizations excluded from act.

Possession of gambling implements prohibited. Obtaining money by means of gambling games or tricks deemed to be 94-2405. larcenv.

- Brace and bunco games prohibited. Soliciting or persuading persons to visit gambling resorts prohibited. 94-2407. 94-2408. Penalty for second offense. Maintaining gambling apparatus a nuisance. Duty of public officer to seize gambling implements and apparatus. 94-2409. 94-2410. Duty of magistrate to retain gambling implement or apparatus for 94-2411. 94-2412. Disposal of moneys confiscated by reason of violation of gambling 94-2413. Authority to break and enter buildings where games are probably being played. 94-2414. Duty of public officer to make complaint. 94-2415. 94-2416. Duty of mayors to enforce law. Officers neglecting duty subject to forfeiture of office. 94-2417. Receiving money to protect offenders prohibited. 94-2418. Losses at gambling may be recovered in civil action. 94-2419. Action may be brought by any dependent person. 94-2420. 94-2421. 94-2422. Pleadings in actions to recover moneys lost. Compelling testimony in such actions.

 Lessor of buildings used for gambling purposes treated as principal. 94-2423. Immunity of witnesses. 94-2424. Ordinances in conflict with this act void. 94-2425. 94-2426. Repealed. Who deemed a principal. Violation of act a misdemeanor. 94-2427. Act, when effective. 94-2428. Slot machines-possession unlawful. 94-2429. 94-2430. Slot machine defined. Person or persons defined. 94-2431.
- 94-2401. (11159) Gambling games prohibited—penalty—license fees for card tables. Every person who deals, or carries on, opens or causes to be opened, or who conducts, or causes to be conducted, operates or runs, either as principal, agent, owner or employee, whether for hire, or not, any game of monte, dondo, fan-tan, tan, studhorse poker, craps, seven and a half, twenty-one, faro, roulette, pangeni or pangene, hokey-pokey, drawpoker, or the game commonly known as round-the-table poker, or any banking or percentage game, or any game commonly known as sure-thing game, or any game of chance played with cards, dice or any device whatsoever, or who runs or conducts or causes to be run or conducted, or keeps any slot machine, punchboard, or other similar machine or device, or permits the same to be run or conducted for money, checks, credits, or any representative of value, or any property or thing whatsoever, or any person owning or in charge of any cigar store, drugstore, or other place of business, or any place where drinks are sold or served, who permits any of the games prohibited in this section to be played, in or about such cigar store, drugstore, or other place of business, or permits any slot machine, punchboard, or similar device to be kept therein, or any person or persons who conduct any bucketshop where stocks or securities of any kind are sold on margins, and every person who plays or bets at or against said prohibited games or devices, except as hereinafter provided, is guilty of a misdemeanor and shall be punishable by a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), and may be imprisoned for not less than three (3) months, nor more than one (1) year, or by both such fine and imprisonment; provided, however, that it shall be lawful for cigar stores, fraternal organizations, charitable organizations, drugstores and

94-2432. Penalty for possession or permitting use of slot machine.

other places of business, upon the payment of a license fee therefor to the county treasurer in the sum of ten dollars (\$10.00) annually per table used or operated in such place of business, to maintain and keep for the use and pleasure of their customers and patrons, card tables and cards with which and at which such games as rummy, whist, bridge whist, blackjack, euchre, pinochle, pangene or pangeni, seven-up, hearts, freeze-out, casino, solo, cribbage, five hundred, penie ante, dominos, high-five and checkers may be played for pastime and amusement by customers who are not minors, and for the maintenance of which a charge may be made, to be paid by the users by the purchase of trade checks which must be redeemable in merchandise at the going retail price of such merchandise, which is the stock in trade of such business; [and that places of business may, upon the payment of a license fee therefor to the county treasurer in the sum of ten dollars (\$10.00) annually, exhibit for use and sale to all customers not minors, trade stimulators, such as pull boards and ticket boards, where each board so used returns to the owner or business not to exceed the going retail price of the goods disposed of and sold and disposed of through the use of the same, and which goods sold and disposed of through the use of the same must not be other than the goods constituting the usual stock in trade of the business using the same.]

History: En. Sec. 600, Pen. C. 1895; amd. Sec. 1, p. 80, L. 1897; amd. Secs. 1, 2 and 3, pp. 166, 167, L. 1901; amd. Sec. 1, Ch. 115, L. 1907; re-en. Sec. 8416, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1917; re-en. Sec. 11159, R. C. M. 1921; amd. Sec. 1, Ch. 153, L. 1937. Cal. Pen. C. Sec. 330.

Compiler's Notes

The second proviso of this section (shown in brackets) was rendered void by the decision of the supreme court in State ex rel. Harrison v. Deniff; the validity of the first proviso was cast into serious doubt by that decision. See annotation on "Constitutionality" below.

That part of this section which relates

That part of this section which relates to slot machines is probably superseded by

secs. 94-2429 to 94-2432.

Cross-References

Betting on elections, sec. 94-1421. Lotteries, secs. 94-3001 to 94-3011.

Constitutionality

This act and sections 84-5701, 84-5702 (since repealed) authorizing and licensing so-called trade stimulators were held void and invalid as violative of section 2, article XIX of the Montana constitution, which prohibits the legislature from authorizing lotteries. The decision was rendered in a case involving punch boards and did not specifically mention the other games enumerated in the first proviso or differentiate between the types of organizations mentioned in that proviso. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140, 141, 142.

Amount of the Stakes Immaterial

This section makes no distinction as to the amount of the stakes involved; hence it is immaterial that the stakes were merely treats or eigars. State v. Dumphy, 57 M 229, 187 P 897.

Disposal of Money Found in Slot Machines

Although provisions for the seizure and destruction of apparatus used for gaming do not authorize seizure of money contained in slot machines and not found by the officer seizing them until they were about to be destroyed by order of court, it does not follow, in an action for its conversion by the operator of the machines, that the taking was unlawful or that plaintiff was entitled to its return. Dorrell v. Clark, 90 M 585, 593, 4 P 2d 712.

The power of courts, whether at law or in equity, may not be invoked by a violator of the law to aid him in securing the fruits of his unlawful acts; hence an operator of slot machines seized under authority of law may not maintain an action to recover money found in them upon their destruction and ordered by the court to be placed in the custody of the clerk of court. (Mr. Justice Angstman dissenting.) Dorrell v. Clark, 90 M 585, 593, 4 P 2d 712.

"Pinbali" Machine Played for Trade Checks, Hickeys, etc., Held Gambling Device—Building Where Used a Nuisance

Held, that a "pinball" machine, equipped with a sloping plane studded with pins

and containing holes into which a small ball, catapulted by means of a spring, must fall to enable the player to win and which pays off in trade checks, is a gambling device under the provisions of this section, and while the evidence shows that by long practice a certain amount of skill may be developed, with the patronizing public it is purely a game of chance, and the building in which it is used is a nuisance under section 94-1002. State ex rel. Dussault v. Kilburn, 111 M 400, 403, 109 P 2d 1113.

Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-2404 or under section 94-1001 et seq., the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

Slot Machines

A so-called mint vending machine which by the insertion of a nickel and pulling a lever will bring the operator a package of mint of the value of five cents, and which may or may not in addition bring to him trade checks good for five cents in trade (and which also may be operated by the insertion of a trade check, in which event trade checks but not mint may or may not be paid), is a gambling device; the machine appeals to the operator's propensities to gamble and lures him into continuing his play in the hope that he may gain an amount much greater than the amount risked. Marvin v. Sloan, 77 M 174, 178, 250 P 443.

Information charging defendant with the operation of slot machines was not subject to demurrer as not charging an offense. State v. Israel, 124 M 152, 220 P

2d_1003, 1009.

There is nothing in this law that makes it lawful for any person or any religious, fraternal or charitable organization, or any private home to run, conduct or keep any slot machine within the state of Montana. State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

This section, banning the possession of slot machines, has not been repealed by sections 84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015, 1016; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d

1029, 1032.

The ban against slot machines was not lifted by sections 84-5701 and 84-5702 (since repealed). State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

The operation of all slot machines is prohibited to all persons without exception. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Sufficiency of Charge

An information charging a violation of the antigambling law in the words of this section was sufficient, and it was not necessary to describe the game in detail, or set out the means by which it was carried on. State v. Ross, 38 M 319, 325, 99 P 1056.

An information charging defendant with permitting a game of chance to be played upon his premises is not defective because of its failure to set forth the names of the persons permitted to play. State v. Rad-milovich, 40 M 93, 98, 105 P 91.

The particular name of a game of chance played with cards for money, checks, etc., need not be stated in the information. State v. Duncan, 40 M 531, 535, 107 P 510.

The allegation that the defendant did carry on, conduct, and cause to be conducted the game described is sufficient to charge an offense without regard to the expression "as owner and proprietor thereof," which may be regarded as surplusage. State v. Tudor, 47 M 185, 131 P 632.

When Innocent Game Becomes Gambling Device

An innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. State ex rel. Dussault v. Kilburn, 111 M 400, 406, 109 P 2d 1113.

Collateral References

Gaming \$\infty\$68 (1-4); Licenses \$\infty\$15 (1).

38 C.J.S. Gaming §§ 1, 86, 87. 38 Am. Jur. 2d, Gambling, p. 119, § 14; p. 121, § 19; p. 132 et seq., § 31 et seq.

Married woman's criminal responsibility for keeping gaming house. 4 ALR 282 and 71 ALR 1116.

Gambling as vagrancy. 14 ALR 1491. Connection with place where gaming is carried on which will render one guilty as keeper thereof. 15 ALR 1202.

Slot vending machine as gambling device. 38 ALR 73 and 81 ALR 177.

Racing as a game within statute. 45 ALR 998.

Money in gambling machine or other receptacle used in connection with gambling, seized by public authorities, rights and remedies in respect of. 79 ALR 1007.

Statutes permitting specified forms of betting, construction and application of. 117 ALR 828.

Prohibitory statute or ordinance, slot machine within, as limited to gambling device. 132 ALR 1004.

What are games of chance, games of skill, and mixed games of chance and skill. 135 ALR 104.

Game of chance, racing as. 135 ALR 183.

Coin-operated pinball machine or similar device, played for amusement only or which confines winner's reward to privilege of additional play or other form of amusement, as prohibited or permitted by antigambling statutes. 148 ALR 879 and 89 ALR 2d 815.

Telephone or telegraph service facilitating betting on horse racing, criminal liability for furnishing of. 153 ALR 465.

Forfeiture of property used in connec-

Forfeiture of property used in connection with gaming before trial of individual offender. 3 ALR 2d 751.

Forfeiture of money used in connection with gambling or seized by officers in connection with an arrest or search on premises where such activities took place. 19 ALR 2d 1228.

Entrapment to commit offense with respect to gambling or lotteries. 31 ALR 2d 1212.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 ALR 3d 726.

Gambling devices, constitutionality of statutes providing for destruction of. 14 ALR 3d 366.

Possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts, validity of criminal legislation as to. 17 ALR 3d 491.

DECISIONS UNDER FORMER LAW

Construction

This section, designed to permit the playing of certain games for amusement and pastime and as business trade stimulators upon payment of a license, held not susceptible of a construction allowing use of trade checks for betting purposes in the games enumerated. State v. Aldahl, 106 M 390, 393, 78 P 2d 935.

Construction of Amendment

The 1937 amendment to this section which added the licensing provisions did not affect section 94-2404. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996.

Not Permissible To Play for Trade Checks Redeemable in Cash or Merchan-

The operator of a cigar store and beer parlor who permitted the game of black-jack to be played therein with trade checks ranging in price from five cents to five dollars, sold by him to the players and which were redeemable, at the option

of the holder, either in merchandise or cash, held properly found guilty of violating this section. State v. Aldahl, 106 M 390, 393, 78 P 2d 935.

Religious, Fraternal and Charitable Organizations

Religious, fraternal and charitable organizations and private homes are by section 94-2403 exempt from the payment of license fees but are not exempt from the provisions of this act which existed prior to the 1937 amendment. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996; State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

Slot Machines

Slot machines are not included among the enumerated "hickey" games nor among the "trade stimulators" from which the ban was lifted by the 1937 amendment known as the "Hickey Law." State v. Israel, 124 M 152, 220 P 2d 1003, 1010; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

94-2402. Licenses—application—expiration. The license fee provided for in the preceding section shall be paid to the treasurer of the county in which such licensee operates before any of the acts or things herein licensed and permitted shall be done, operated, or used, and the applicant for a license shall, along with the amount of the license fee, send or give to the county treasurer the name and location of the business for which the license is sought, together with the names of all the owners thereof, whereupon the county treasurer shall issue a license to said place of business, which license shall show on the face thereof, the number of card tables for which license is paid, and the trade stimulators, if any, for the use of which license is paid. All licenses issued hereunder shall expire each and every year at midnight, the 31st day of December, of the calendar year for which they are issued. The funds so received shall be deposited in the poor fund of the county.

History: En. Sec. 2, Ch. 153, L. 1937.

Compiler's Note

See the first Compiler's Note to section 94-2401 and the annotation on "Constitutionality" under that section.

Collateral References

Licenses 22, 32 (1), 33. 53 C.J.S. Licenses § 32 et seq. 38 Am. Jur. 2d 119, Gambling, § 14.

94-2403. Organizations excluded from act. Any religious, fraternal or charitable organization, and all private homes are not included within the provisions of this act.

History: En. Sec. 3, Ch. 153, L. 1937.

Construction

The words "this act" in this section mean the licensing provisions of section 94-2401 which were added by the 1937 act but not the remainder of such section which was in existence prior to such 1937 amendment. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996.

Slot Machines

There is nothing in this law that makes it lawful for any person or any religious, fraternal or charitable organization, or any private home to run, conduct or keep any slot machine within the state of Montana. State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

Where Evidence That Club Connected with Fraternal Organization Insufficient

Evidence in an action to abate a gambling nuisance under section 94-1002, conducted by a club claiming immunity from prosecution for allowing gambling on the premises occupied by it, on the alleged ground that it was connected with a fraternal organization or a dramatic branch thereof, held insufficient to show such connection, it on the other hand showing that there was no regularity of membership and that anyone whom the doorkeeper, one of the defendants, felt like admitting could enter and participate in the game of "keno" being played on the premises.

State ex rel. Leahy v. O'Rourke, 115 M 502, 504, 146 P 2d 168.

Where Fraternal Organization Scheme Mere Subterfuge

In an action to abate a gambling nuisance conducted in the club rooms of a fraternal organization wherein exemption was claimed from the operation of the gambling laws under this section, evidence held sufficient to justify the finding that the entire scheme of operations was a mere subterfuge, and that the gambling was not limited to nor for the amusement of bona fide members, but was operated as a business; the question in abatement being whether a duly organized fraternal organization is permitting practices in its club rooms in violation of the gambling laws as distinguished from a quo warranto attack upon corporate status. State ex rel. Bottomly v. Johnson, 116 M 483, 485, 154 P 2d 262.

The enumerated exclusions do not exclude an individual who shares in the profits and who operates as he pleases, not in conformity with the bylaws of the organization and without regard to the rights of the governing body of such excluded body. State v. Hovland, 118 M 454, 169 P 2d 341, 343.

Collateral References

Gaming©79 (1). 38 C.J.S. Gaming §§ 83, 99, 101. 38 Am. Jur. 2d 151, Gambling, § 56.

94-2404. (11160) Possession of gambling implements prohibited. Any person who has in his possession, or under his control, or who permits to be placed, maintained or kept in any room, space, inclosure or building, owned, leased or occupied by him, or under his management or control, any faro box, faro layout, roulette wheel, roulette table, crap table, slot machine, or any machine or apparatus of the kind mentioned in the preceding section of this act, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months nor more than one year in the discretion of the court; provided, however, that this section shall not apply to a public officer, or to a person coming into possession thereof in or by reason of the performance of an official duty and holding the same to be disposed of according to law.

History: En. Sec. 2, Ch. 115, L. 1907; Sec. 8417, Rev. C. 1907; re-en. Sec. 11160, R. C. M. 1921.

Compiler's Note

The "preceding section" referred to in this section is section 94-2401.

Effect of Other Laws

This section was not affected by the 1937 amendment to section 94-2401. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

This section, banning the possession of slot machines, has not been repealed by sections 84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P

2d 1015, 1016; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-2401 or under section 94-1001 et seq., the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

Collateral References

Gaming \$\infty 74 (1-7).

38 C.J.S. Gaming §§ 1, 86, 96-98, 102, 106.

38 Am. Jur. 2d 171 et seq., Gambling, § 82 et seq.

DECISIONS UNDER FORMER LAW

Religious, Fraternal and Charitable Organizations

Religious, fraternal and charitable organizations and private homes are by section 94-2403 exempt from the payment of license fees but are not exempt from the

provisions of this act which existed prior to the 1937 amendment adding the licensing provisions. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 996; State v. Israel, 124 M 152, 220 P 2d 1003, 1011.

94-2405. (11161) Obtaining money by means of gambling games or tricks deemed to be larceny. Every person who, by means of any game, device, sleight-of-hand trick, or other means whatever, by the use of cards or other implements other than those mentioned in the following section hereof, or while betting on sides, or hands, of any such game or play, fraudulently obtains from another person money or property of any description, shall be deemed guilty of larceny of property of like value.

History: En. Sec. 3, Ch. 115, L. 1907; Sec. 8418, Rev. C. 1907; re-en. Sec. 11161, R. C. M. 1921. Cal. Pen. C. Sec. 332.

Collateral References

Larceny № 14 (1). 52A C.J.S. Larceny § 1 (4).

94-2406. (11162) Brace and bunco games prohibited. Every person who uses or deals with or wins any money or property by the use of brace faro, or of any two-card faro box, or any brace roulette wheel or roulette table, or any brace apparatus, or with loaded dice or with marked cards, or by any game commonly known as a confidence game or bunco, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 4, Ch. 115, L. 1907; Sec. 8419, Rev. C. 1907; re-en. Sec. 11162, R. C. M. 1921.

Confidence or Bunco Game

Any game which is by this statute outlawed may be a confidence or bunco game, for the design and conduct of those who use it gives it its character under this statute. State v. Hale, 134 M 131, 328 P 2d 930, 936.

Gambling Devices

The games described in this section are purported gambling devices so contrived, although masked as legitimate operations, to bilk the victim of his wager by manipulation. These games do not depend upon the active or passive emotions of the victim. State v. Hale, 134 M 131, 328 P 2d 930, 934.

"Morocco"

Defendant who used and dealt with game of "Morocco," a confidence game and bunco game, to win money from his victim was properly convicted of the crime prohibited by this section. State v. Hale, 134 M 131, 328 P 2d 930, 934, 935.

Penalty

The penalty of violating this statute is imposed upon every person who uses or deals with any game commonly known as a confidence game or bunco, as well as one who wins. State v. Hale, 134 M 131, 328 P 2d 930, 933.

Purpose of Statute

This statute is aimed at the person who uses or deals with a confidence game, or bunco game, and not so much against the inanimate paraphernalia so used. State v. Hale, 134 M 131, 328 P 2d 930, 936.

Separate and Distinct Crime

This statute covers a separate and distinct crime from that covered by section 94-1806. State v. Hale, 134 M 131, 328 P 2d 930, 934.

Use of Confidence Game

It is a crime to use or deal with a confidence game or bunco. State v. Hale, 134 M 131, 328 P 2d 930, 934.

Collateral References

False Pretenses 17; Gaming 68 (1), (2).

35 C.J.S. False Pretenses § 48; 38 C.J.S. Gaming §§ 1, 3, 4.

94-2407. (11163) Soliciting or persuading persons to visit gambling resorts prohibited. Any person who persuades or solicits another to visit any room, tent, apartment or place used, or represented by the person soliciting or persuading to be a place used for the purpose of running any of the games prohibited by this act, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment not less than three months nor more than one year, or by both such fine and imprisonment in the county jail.

History: En. Sec. 5, Ch. 115, L. 1907; Sec. 8420, Rev. C. 1907; re-en. Sec. 11163, R. C. M. 1921. Cal. Pen. C. Sec. 318.

Cross-Reference

Enticing to gambling place, sec. 94-3610.

Collateral References

Gaming 77. 38 C.J.S. Gaming §§ 1, 107.

94-2408. (11164) Penalty for second offense. Every person who, having been convicted of a violation of any of the provisions of this act, which is punishable by fine, commits another such violation after such conviction, is punishable by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail for not less than six months nor more than one year.

History: En. Sec. 6, Ch. 115, L. 1907; Sec. 8421, Rev. C. 1907; re-en. Sec. 11164, R. C. M. 1921.

Collateral References

Criminal Law 21211. 24 C.J.S. Criminal Law § 1973.

94-2409. (11165) Maintaining gambling apparatus a nuisance. Any article, machine or apparatus maintained or kept in violation of any of the provisions of this act is a public nuisance, but the punishment for the maintaining or keeping of the same shall be as provided in this act.

History: En. Sec. 7, Ch. 115, L. 1907; re-en. Sec. 8422, Rev. C. 1907; re-en. Sec. 11165, R. C. M. 1921.

Public Nuisances

Any article, machine or apparatus maintained or kept in violation of any of the provisions of sections 94-2401 or 94-2404 is a public nuisance. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Slot Machines

The using, operating, keeping, and maintaining for use, of slot machines constitutes a nuisance. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State v. Israel, 124 M 152, 220 P 2d 1003, 1011; State ex rel. Brown v. Buffalo Rapids Club, 124 M 172, 220 P 2d 1014.

Collateral References

Nuisance 61. 66 C.J.S. Nuisances § 48. 38 Am. Jur. 2d 119, Gambling, § 16. 94-2410. (11166) Duty of public officer to seize gambling implements and apparatus. It shall be the duty of every officer authorized to make arrests, to seize every machine, apparatus, or instrument answering to the description contained in this act, or which may be used for the carrying on or conducting of any game or games mentioned in this act, and to arrest the person actually or apparently in possession or control thereof, or of the premises in which the same may be found, if any such person be present at the time of the seizure and to bring the machine, apparatus, or instrument and the prisoner, if there be one, before a committing magistrate.

History: En. Sec. 8, Ch. 115, L. 1907; Sec. 8423, Rev. C. 1907; re-en. Sec. 11166, R. C. M. 1921.

Decree Requiring Sale Amended

Decree requiring sheriff to sell seized slot machines was amended on appeal to require the sheriff to destroy such machines. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1001.

Collateral References

Gaming \$58.
38 C.J.S. Gaming \$78.
38 Am. Jur. 2d 231 et seq., Gambling,
§174 et seq.

Forfeiture of property used in connection with gaming before trial of individual offender. 3 ALR 2d 751.

94-2411. (11167) Duty of magistrate to retain gambling implement or apparatus for trial. The magistrate before whom any machine, apparatus, or instrument is brought pursuant to the preceding section must, if there be a prisoner and if he shall hold such prisoner, cause the machine, apparatus, or instrument to be delivered to the county attorney to be used as evidence on the trial of such prisoner. If there be no prisoner, or if the magistrate does not hold the prisoner, he must cause the immediate and public destruction of the machine, apparatus, or instrument in the presence of said magistrate. No person owning or claiming to own any such machine, apparatus, or instrument so destroyed, shall have any right of action against any person or against the state, county, or city for the value of such article, or for damages. It shall be the duty of the county attorney to produce such articles in court on the trial of the case. It shall be the duty of the trial court, after the disposition of the case, and whether the defendant be convicted, acquitted, or fails to appear for trial, to cause the immediate and public destruction of any such article by the sheriff or any other officer or person designated by the court.

History: En. Sec. 9, Ch. 115, L. 1907; Sec. 8424, Rev. C. 1907; re-en. Sec. 11167, R. C. M. 1921.

Return of Machines Erroneous

It was error for district court to order slot machines and other gambling equipment returned to defendant on an ex parte proceeding before the disposition of the case and the order was void ab initio.

State v. Israel, 124 M 152, 220 P 2d 1003, 1009.

Collateral References

Gaming € 61. 38 C.J.S. Gaming § 79.

Constitutionality of statute providing for destruction of gambling devices. 14 ALR 3d 366.

94-2412. (11167.1) Disposal of moneys confiscated by reason of violation of gambling laws. All moneys seized or taken by any peace officer and confiscated by order of any court, by reason of a violation of the gambling laws of the state of Montana, shall be deposited with the county treasurer of the county in which such seizure and confiscation was made, and shall be credited to the poor fund of the county.

History: En. Sec. 1, Ch. 25, L. 1933.

Return of Machines Erroneous

It was error for district court to order slot machines and other gambling equipment returned to defendant on an exparte proceeding before the disposition of the case and the order was void ab initio. State v. Israel, 124 M 152, 220 P 2d 1003, 1009.

Collateral References

Jury trial in case of seizure of gaming devices. 17 ALR 573 and 50 ALR 97.

Rights and remedies in respect of money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities. 79 ALR 1007.

94-2413. (11168) Authority to break and enter buildings where games are probably being played. Every sheriff, constable and public officer having probable cause to believe that any room, tent, or apartment is being used as a room, tent, or apartment for the playing or conducting of any of the games mentioned in this acc, shall have authority to break open any door, or opening into any such room, tent, or apartment, with or without a warrant of arrest, for the purpose of arresting the offenders against this act.

History: En. Sec. 10, Ch. 115, L. 1907; Sec. 8425, Rev. C. 1907; re-en. Sec. 11168, R. C. M. 1921,

Collateral References

Gaming € 60. 38 C.J.S. Gaming § 78.

94-2414. (11169) Duty of public officer to make complaint. Every county attorney, sheriff, constable, chief of police, marshal, or police officer must inform against and make complaint and diligently prosecute persons whom they know, or concerning whom they may be informed, or whom they may have reasonable cause to believe to be offenders against the provisions of this act. The neglect or refusal of any such officer to make complaint against or diligently prosecute persons he has reasonable cause to believe to be offenders against the provisions of this act shall be deemed sufficient cause for removal from office.

History: En. Sec. 11, Ch. 115, L. 1907; Sec. 8426, Rev. C. 1907; re-en. Sec. 11169, R. C. M. 1921.

Collateral References

District and Prosecuting Attorneys 8; Municipal Corporations 182, 183 (5), 189; Sheriffs and Constables 86. 27 C.J.S. District and Prosecuting Attorneys §§ 10, 14; 62 C.J.S. Municipal Corporations §§ 565, 566, 575; 80 C.J.S. Sheriffs and Constables § 42.

94-2415. (11170) Duty of mayors to enforce law. It shall be the duty of every mayor of every town or city in this state to cause this act to be diligently enforced and to cause the police officers of his city or town to arrest and to make complaint against any and all persons whom he or they know, or have reasonable cause to believe to be offenders against any of the provisions of this act.

History: En. Sec. 12, Ch. 115, L. 1907; Sec. 8427, Rev. C. 1907; re-en. Sec. 11170, R. C. M. 1921.

Collateral References

Municipal Corporations 168. 62 C.J.S. Municipal Corporations § 545.

94-2416. (11171) Officers neglecting duty subject to forfeiture of office. Every county attorney, sheriff, mayor, constable, chief of police, marshal, or police officer who shall refuse or neglect to perform any of the duties imposed upon him by any of the provisions of this act, shall be guilty of a misdemeanor and be punishable by a fine of not less than one hundred nor

more than three thousand dollars, or imprisonment for not less than six months nor more than one year in the county jail. A conviction under this section shall, unless set aside, also work a forfeiture of the office of such officer and operate as a removal from office. But a prosecution under this section shall not bar or interfere with any proceeding or action for removal from office which may be brought under any other provision of law or statute, nor affect or limit the effect or operation of any other statute regarding removals or suspensions from office.

History: En. Sec. 13, Ch. 115, L. 1907; Sec. 8428, Rev. C. 1907; re-en. Sec. 11171, R. C. M. 1921.

Collateral References

District and Prosecuting Attorneys 2 (5), 11; Municipal Corporations 156, 182,

183 (3), (5); Sheriffs and Constables \$\infty\$6, 13, 153.

27 C.J.S. District and Prosecuting Attorneys §§ 6, 7, 9, 17; 62 C.J.S. Municipal Corporations §§ 504 et seq., 549, 582; 80 C.J.S. Sheriffs and Constables §§ 10, 18.

94-2417. (11172) Receiving money to protect offenders prohibited. Every state, county, city, or township officer, or other person, who shall ask for, receive, or collect any money or valuable consideration, either for his own or for the public use, or the use of any other person or persons, for and with the understanding that he will protect or exempt any person from arrest or conviction for any violation of the provisions of this act, or that he will abstain from arresting or prosecuting, or causing to be arrested or prosecuted, any person offending against any of the provisions of this act, or that he will permit any of the things prohibited by this act to be done or carried on, and every such state, county, city, or township officer who shall grant, issue, or deliver, or cause to be issued or delivered to any person or persons, any license, permit, or other privilege giving or pretending to give any authority or right to any person or persons to carry on, conduct, open, or cause to be conducted or opened or carried on, any game or games which are forbidden by any of the provisions of this act, is guilty of a felony.

History: En. Sec. 14, Ch. 115, L. 1907; Sec. 8429, Rev. C. 1907; re-en. Sec. 11172, R. C. M. 1921. Cal. Pen. C. Sec. 337.

Collateral References

Compounding Offenses ≈ 2. 15 C.J.S. Compounding Offenses § 4. 15 Am. Jur. 2d 929 et seq., Compounding Offenses, § 1 et seq.

94-2418. (11173) Losses at gambling may be recovered in civil action. If any person, by playing or betting at any of the games prohibited by this act, loses to another person any sum of money, or thing of value, and pays or delivers the same, or any part thereof, to any person connected with the operating or conducting of such game, either as owner, or dealer, or operator, the person who so loses and pays or delivers may, at any time within sixty days next after the said loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof from any person having any interest, direct or contingent, in the game, as owner, backer, or otherwise, with costs of suit, by civil action before any court of competent jurisdiction, together with exemplary damages, which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in said suit, all persons having any interest, direct or contingent, in such game as backers, owners, or otherwise.

History: En. Sec. 15, Ch. 115, L. 1907; Sec. 8430, Rev. C. 1907; re-en. Sec. 11173, R. C. M. 1921.

Antigambling Law Not Rendered Invalid

The antigambling law was not rendered invalid by the insertion of this section, creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost, together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the act. State v. Ross, 38 M 319, 324, 99 P 1056.

Course of Action Not Stated

Under this case, held, that the complaint in an action to recover the amount of two dollars lost by plaintiff as an alleged bet on a horse race, with exemplary damages, under this section, alleging in substance that defendant fair association had given notice that it would conduct horse racing for purses, at which any owner or cowner of a horse competing in the races would be required to pay an entrance fee

of two dollars and that no person other than such owner or co-owners would be permitted to pay an entrance fee; that plaintiff representing himself to be a co-owner of a certain horse paid the required fee for that horse in a race to be run; that the horse did not win; that the purse plus an amount equal to the entrance fees for that horse was paid to the owners or co-owners of the winning horse; that the purse was made up of funds belonging to the association and that the association did not have any interest in the outcome of the race, etc., did not state a cause of action and that a demurrer thereto was properly sustained. Toomey v. Penwell, 76 M 166, 170, 245 P 943.

Collateral References

Gaming 41, 46 (2).
38 C.J.S. Gaming §§ 46, 48, 54.
38 Am. Jur. 2d 259 et seq., Gambling,
§ 212 et seq.

Assignment of, or succession to, statutory right of action for recovery of money lost at gambling. 18 ALR 2d 999.

94-2419. (11174) Action may be brought by any dependent person. If any person losing such money or thing of value does not, within sixty days, without collusion or deceit, sue and with effect prosecute for the money or thing of value so lost and paid or delivered, any person, or a guardian of any person, dependent in any degree for support upon or entitled to the earnings of such persons losing said money or thing of value, or any citizen for the use of the person so dependent, may, within one year, sue for and recover the same, with costs of suit and exemplary damages as aforesaid, against any and all persons having any interest, direct or contingent, in the said game as backers, owners, or otherwise, as aforesaid.

History: En. Sec. 16, Ch. 115, L. 1907; Sec. 8431, Rev. C. 1907; re-en. Sec. 11174, R. C. M. 1921.

Collateral References

Gaming 526 (4). 38 C.J.S. Gaming §§ 1, 35, 36, 38. 38 Am. Jur. 2d 271-273, Gambling, §§ 228-230.

94-2420. (11175) Pleadings in actions to recover moneys lost. In the prosecutions of such actions it shall be sufficient for the complaint to allege that the defendant is indebted to the plaintiff's use, the money or thing of value so lost and paid or delivered, whereby the plaintiff's action accrued to him, or to the person for whose use the suit is brought, without setting forth the special matter. In case suit is brought by a plaintiff for the use of another person, that fact and the name of the person for whose use the suit is brought shall be stated.

History: En. Sec. 17, Ch. 115, L. 1907; Sec. 8432, Rev. C. 1907; re-en. Sec. 11175, R. C. M. 1921.

Collateral References

Gaming €= 48 (1). 38 C.J.S. Gaming § 56. 38 Am. Jur. 2d 287, Gambling, § 257.

(11176) Compelling testimony in such actions. Every person liable in a civil action under this act may be compelled to answer, upon oath, interrogatories annexed to the complaint in such civil action for the purpose of discovery of his liability; and upon discovery and repayment of the money or other thing, the person discovering and repaying the same, with costs and such an amount of exemplary damages as may be agreed upon by the parties, or fixed by the court, shall be acquitted and discharged from any further or other forfeiture, punishment, penalty, or prosecution he or they may have incurred for so winning such money or thing, discovered and repaid.

History: En. Sec. 18, Ch. 115, L. 1907; Sec. 8433, Rev. C. 1907; re-en. Sec. 11176, R. C. M. 1921.

Collateral References

Discovery 30; Gaming 42 (1). 27 C.J.S. Discovery § 23; 38 C.J.S. Gaming §§ 38, 39.

94-2422. (11177) Lessor of buildings used for gambling purposes treated as principal. Whenever premises are occupied for the doing of any of the things, or running any of the games prohibited by this act, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action, or by action of forcible detainer; and if any person lease premises for any such purpose, or knowingly permits them to be used or occupied for such purpose or purposes, or knowing them to be so occupied or used, fails immediately to prosecute, in good faith an action or proceeding for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in running the games or doing the things run or done in such building, in violation of this act, and shall be dealt with and punished accordingly.

History: En. Sec. 19, Ch. 115, L. 1907; Sec. 8434, Rev. C. 1907; re-en. Sec. 11177, R. C. M. 1921.

Collateral References

Gaming 79 (1); Landlord and Tenant

© 29 (3).

38 C.J.S. Gaming §§ 83, 99, 101; 51
C.J.S. Landlord and Tenant § 226. 38 Am. Jur. 2d 201, Gambling, § 127.

Married woman's criminal responsibility for keeping gaming house, 4 ALR 282 and 71 ALR 1116.

Connection with place where gaming is carried on which will render one guilty as keeper thereof. 15 ALR 1202.

What is "outhouse" where people resort within meaning of statute as to gaming. 20 ALR 243.

94-2423. (11178) Immunity of witnesses. No person shall be excused from attending or testifying or producing any books, papers, documents, or any thing or things, before any court or magistrate upon any investigation, proceeding or trial for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence of, documentary or otherwise; and no testimony or evidence so given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

History: En. Sec. 20, Ch. 115, L. 1907; Sec. 8435, Rev. C. 1907; re-en. Sec. 11178, R. C. M. 1921.

Privilege or Immunity Must Be Claimed

Even though it be assumed that the provisions of this section were broad enough to include testimony before a grand jury it would have no application where defendant failed to claim either privilege or immunity when called before the grand jury. State v. Saginaw, 124 M 225, 220 P 2d 1021, 1023, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

Testimony before Grand Jury

The words "grand jury" should not be read into this section which gives immunity from prosecution to persons testifying before a "court or magistrate." State v. Saginaw, 124 M 225, 220 P 2d 1021, 1023.

Defendant cannot, because of testimony before grand jury, be immune from prosecution for offense charged in information filed by county attorney weeks before impanelment of a grand jury. State v. Saginaw, 124 M 225, 220 P 2d 1021, 1023; State v. McRae, 124 M 238, 220 P 2d 1025, 1027, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

Collateral References

Criminal Law 42; Witnesses 297. 22 C.J.S. Criminal Law §§ 41, 46; 98 C.J.S. Witnesses § 439.

21 Am. Jur. 2d 215 et seq., Criminal Law, § 146 et seq.; 58 Am. Jur. 72 et seq., Witnesses, § 84 et seq.

94-2424. (11179) Ordinances in conflict with this act void. Upon the passage of this act, all ordinances and parts of ordinances of cities and towns in this state regarding gambling and gambling houses shall be inoperative and void, and thereafter no ordinance regarding gambling or gambling houses shall be passed by any city or town.

History: En. Sec. 21, Ch. 115, L. 1907; Sec. 8436, Rev. C. 1907; re-en. Sec. 11179, R. C. M. 1921.

Collateral References

Municipal Corporations ≈ 78. 62 C.J.S. Municipal Corporations § 197. 38 Am. Jur. 2d 118, Gambling, § 13.

94-2425. (11180) Repealed—Chapter 196, Laws of 1965.

Repeal

Section 94-2425 (Sec. 1, Ch. 20, L. 1909; Sec. 1, Ch. 92, L. 1909; Sec. 1, Ch. 55, L. 1915; Sec. 1, Ch. 103, L. 1929), relating to racing bets, was repealed by Sec. 15, Ch. 196, Laws 1965.

94-2426. (11181) Who deemed a principal. Any person who aids or abets in the commission of any of the acts herein declared to be unlawful, either by transmitting or communicating or transferring money or other thing of value, or information for the purpose of having bets or wagers made or reported or recorded or registered, shall be deemed a principal in the commission of such offense.

History: En. Sec. 3, Ch. 20, L. 1909; re-en. Sec. 3, Ch. 92, L. 1909; re-en. Sec. 2, Ch. 55, L. 1915; re-en. Sec. 11181, R. C. M. 1921.

Collateral References

Gaming ₹ 79 (1).
38 C.J.S. Gaming § 83, 99, 101.
38 Am. Jur. 2d 202 et seq., Gambling, § 129 et seq.

94-2427. (11182) Violation of act a misdemeanor. Every person or persons violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars or more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 20, L. 1909; re-en. Sec. 4, Ch. 92, L. 1909; re-en. Sec. 3, Ch. 55, L. 1915; re-en. Sec. 11182, R. C. M. 1921.

Collateral References
Gaming© 106.
38 C.J.S. Gaming § 132.

94-2428. (11183) Act, when effective. This act is hereby declared to be necessary for the immediate preservation of the public peace, health, and safety, and shall take effect from and after its passage and approval by the governor.

History: En. Sec. 5, Ch. 55, L. 1915; re-en. Sec. 11183, R. C. M. 1921.

Collateral References Gaming € 3 (2). 38 C.J.S. Gaming § 2.

94-2429. Slot machines — possession unlawful. From and after the passage and approval of this act, it shall be a misdemeanor and punishable, as hereinafter provided, for any person to use, possess, operate, keep or maintain for use or operation or otherwise, anywhere within the state of Montana, any slot machine of any sort or kind whatsoever.

History: En. Sec. 1, Ch. 197, L. 1949.

Collateral References
Gaming 579 (1).
38 C.J.S. Gaming \$99.
38 Am. Jur. 2d 171 et seq., Gambling,
\$82 et seq.

94-2430. Slot machine defined. A slot machine is hereby defined as a machine operated by inserting a coin, token, chip or trade check therein by the player and from the play of which he obtains, or may obtain, money, checks, chips or tokens redeemable in money. Merchandise vending machines where the element of chance does not enter into their operation are not within the provisions of this act.

History: En. Sec. 2, Ch. 197, L. 1949.

94-2431. Person or persons defined. In addition to their ordinary meaning, the word "person" or "persons," as used in this act, shall include both natural and artificial persons and all partnerships, corporations, associations, clubs, fraternal orders and societies, including religious, fraternal and charitable organizations.

History: En. Sec. 3, Ch. 197, L. 1949.

94-2432. Penalty for possession or permitting use of slot machine. Any person, partnership, club, society, fraternal order, corporation, co-operative association or any other person, individual or organization who violates any of the provisions of this act, or who permits the use of any slot machine, as herein defined, on any place or premises owned, occupied or controlled by him or it, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 197, L. 1949.

Separability of Provisions

Section 6 of Ch. 197, L. 1949 read, "If any part of this act shall be declared by

any court of competent jurisdiction to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act."

CHAPTER 25

HOMICIDE

Section 94-2501. Murder defined.

94-2502. Malice defined—express or implied.

94-2503. Degrees of murder. 94-2504. Repealing clause.

94-2505. Punishment for murder. 94-2506. Petit treason abolished.

94-2507. Manslaughter-voluntary and involuntary.

94-2508. Punishment for manslaughter.

94-2509. Deceased must die within a year and a day.

94-2510. Proof of corpus delicti.

94-2511. Excusable homicide.

94-2512. Justifiable homicide by public officers. 94-2513. Justifiable homicide by other persons.

94-2514. Bare fear not to justify killing.

94-2515. Justifiable and excusable homicide not punishable.

94-2501. (10953) Murder defined. Murder is the unlawful killing of a human being with malice aforethought.

History: En. Sec. 15, p. 178, Bannack Stat.; re-en. Sec. 18, p. 273, Cod. Stat. 1871; re-en. Sec. 18, 4th Div. Rev. Stat. 1879; re-en. Sec. 18, 4th Div. Comp. Stat. 1887; re-en. Sec. 350, Pen. C. 1895; re-en. Sec. 8290, Rev. C. 1907; re-en. Sec. 10953, R. C. M. 1921, Cal. Pen. C. Sec. 187.

Cross-References

Death caused by holdup of train, sec. 94-3207.

Limitation of action, sec. 94-5701.

Proof in homicide cases, secs. 94-7212,

Conspiracy

94-7213.

A coconspirator may be found guilty of a crime committed by his fellow conspirator whether the fellow conspirator is alive or dead, competent or incompetent, at the time of his trial. State v. Alton, 139 M 479, 365 P 2d 527, 535.

All participants in a conspiracy may be found guilty of any of the degrees of murder or one or more may be found guilty of each degree. State v. Alton, 139 M 479, 365 P 2d 527, 538.

Distinction between Murder and Manslaughter

The distinction between murder and manslaughter is that the element of malice aforethought enters into the former, while it is wanting in the latter. State v. Sloan, 22 M 293, 302, 56 P 364.

Sufficiency of Charge

An indictment for murder, good at common law, is good under the statute. Territory of Montana v. Stears, 2 M 324, 327; Territory of Montana v. Young, 5 M 242, 243, 5 P 248; State v. Lu Sing, 34 M 31, 35, 85 P 521; State v. McGowan, 36 M 422, 428, 93 P 552.

In an information for murder, it is sufficient to allege that the killing was with malice aforethought. The elements of premeditation and deliberation are matters of proof. Territory of Montana v. Stears, 2 M 324, 327; Territory of Montana v. Mc Andrews, 3 M 158, 161; State v. Metcalf, 17 M 417, 420, 43 P 182; State v. Lu Sing, 34 M 31, 35, 85 P 521; State v. Hayes, 38 M 219, 221, 99 P 434; State v. Nielson, 38 M 451, 454, 100 P 229. See also State v. Guerin, 51 M 250, 257, 152 P 747.

An information charging a husband with a willful failure to provide for his wife and to protect her from the cold and inclement weather, as a result of which she died, will sustain a conviction for murder in the second degree. Territory v. Manton, 7 M 162, 168, 14 P 637.

An information charging that accused committed a murder willfully, unlawfully, feloniously, and premeditatedly, and of his malice aforethought, charges murder in the first degree, though it fails to use the word "deliberately." State v. Hliboka, 31 M 455, 457, 78 P 965.

An information stating that the defendant unlawfully, feloniously, willfully, premeditatedly, deliberately, and of his malice aforethought, shot and killed a person named, a human being, sufficiently charges murder. State v. Crean, 43 M 47, 53, 114 P 603.

Collateral References

Homicide € 7. 40 C.J.S. Homicide § 13. 40 Am. Jur. 2d 331, Homicide, § 41.

Wife's confession of adultery as affecting degree of homicide in killing her paramour. 10 ALR 470.

Intent to aid and abet perpetrator, or entering into his design, as necessary to make one present at homicide without preconcert or conspiracy, criminally responsible. 12 ALR 277.

Homicide, responsibility of persons participating in jail escape for homicide committed by one of their number. 15 ALR 456.

Homicide by unlawful acts aimed at another. 18 ALR 917.

Time elapsing between wound and death as affecting homicide. 20 ALR 1006 and 93 ALR 1470.

Instruction as to lesser degree of crime, duty of court as to, where statute fixes degree of homicide in perpetration of felony. 21 ALR 628; 27 ALR 1100 and 102 ALR 1030.

Humanitarian motives for homicide. 25 ALR 1007.

Homicide by fright or shock. 47 ALR 1072.

Intoxication as affecting question of intent or malice. 79 ALR 899.

Necessity of intent to kill to bring death resulting from arson within statute making homicide in perpetration of felony murder in first degree. 87 ALR 414.

Homicide in connection with negligent operation of automobile or use of automobile for unlawful purpose or in violation of law. 99 ALR 756.

Homicide by companion of defendant while attempting to make escape from scene of crime as murder in first degree. 108 ALR 847.

Instruction applying rule of reasonable

doubt as to intent or malice as curing error in instruction placing burden of proof upon defendant in that regard, 120 ALR 610.

Mental deficiency not amounting to insanity as affecting question of premeditation and deliberation in murder case. 166 ALR 1194.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

Causing one, by threats or fright, to leap or fall to his death. 25 ALR 2d 1186.

Murder in connection with offense under Federal Bank Robbery Act. 59 ALR 2d 974, 975.

Dying declarations involving an asserted opinion or conclusion, admissibility in criminal trial. 86 ALR 2d 905.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 ALR 3d 1292.

Res gestae, admissibility as part of, accusatory utterances made by homicide victim after act. 4 ALR 3d 149.

Self-defense, relationship with assailant's wife as provocation depriving defendant of right of. 9 ALR 3d 933.

Negligent homicide by operation of a motor vehicle, what amounts to negligence within meaning of statutes penalizing. 20 ALR 3d 473.

Homicide by automobile as murder. 21 ALR 3d 116.

Mental or emotional condition as diminishing responsibility for crime. 22 ALR 3d 1228.

94-2502. (10954) Malice defined—express or implied. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

History: Ap. p. Secs. 16, 17, pp. 178, 179, Bannack Stat.; re-en. Secs. 19, 20, p. 273, Cod. Stat. 1871; re-en. Secs. 19, 20, 4th Div. Rev. Stat. 1879; re-en. Secs. 19, 20, 4th Div. Comp. Stat. 1887; en. Sec. 351, Pen. C. 1895; re-en. Sec. 8291, Rev. C. 1907; re-en. Sec. 10954, R. C. M. 1921. Cal. Pen. C. Sec. 188.

Malice May Be Inferred

It is not essential to a conviction of murder that a motive for the crime be shown. Malice may be inferred from the fact that no considerable provocation appears, or that the circumstances attending the killing show an abandoned and malignant heart. State v. Roberts, 44 M 243, 245, 119 P 566.

It is not necessary to show pre-existing malice against the deceased and malice may be shown directly or may be inferred from a lack of provocation. State v. London, 131 M 410, 310 P 2d 571, 582.

Malice Shown

In a prosecution for murder, the jury is justified in finding a malicious intent to take human life, where the defendant, a short time prior to the killing, declared his intention of shooting the person whom he should see in possession of his saddle horse, and where he did do so, though the victim was a stranger to him. State v. Leakey, 44 M 354, 366, 120 P 234.

When Malice Presumed

The malice which brands a homicide as murder may be express or implied, and on proof of the homicide by defendant, in the absence of evidence tending to show that the act amounted only to manslaughter or that the killing was justifiable or excusable, malice is presumed and the crime is presumed to be murder in the second degree. State v. Chavez, 85 M 544, 549, 281 P 352.

Malice may be express or implied and on proof of homicide by the defendant, malice is presumed, but the presumption does not exist in the presence of evidence tending to show that the act amounts only to manslaughter. State v. Rivers, 133 M 129, 320 P 2d 1004, 1006.

Collateral References

Intoxication as affecting question of intent or malice. 79 ALR 899.
Inference of malice or intent to kill

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR 2d 854.

94-2503. (10955) Degrees of murder. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, is murder of the first degree; and all other kinds of murder are of the second degree.

History: En. Sec. 17, p. 179, Bannack Stat.; re-en. Sec. 21, p. 273, Cod. Stat. 1871; re-en. Sec. 21, 4th Div. Rev. Stat. 1879; re-en. Sec. 21, 4th Div. Comp. Stat. 1887; amd. Sec. 352, Pen. C. 1895; re-en. Sec. 8292, Rev. C. 1907; amd. Sec. 1, Ch. 3, L. 1919; re-en. Sec. 10955, R. C. M. 1921. Cal. Pen. C. Sec. 189.

Burden of Proof

To sustain a conviction of murder in the first degree, it is incumbent upon the state to show by the record not only that it discharged the burden resting upon it to establish the killing by defendant, but also that it proved deliberation and premeditation on his part. State v. Gunn, 85 M 553, 555, 281 P 757.

After the state has made proof of the homicide charged, the crime is presumed to be murder in the second degree, the burden then resting upon the state to introduce evidence satisfying the jury beyond a reasonable doubt that there was deliberation and premeditation to raise the crime to murder in the first degree. State v. Le Duc, 89 M 545, 562, 300 P 919.

Circumstantial Evidence Will Warrant First Degree

Evidence, entirely circumstantial in character, in a prosecution for murder in the first degree charged to have been committed by defendant and another, transients traveling on a freight train, while robbing, or attempting to rob, another transient, held sufficient to warrant conviction. State v. Miller, 91 M 596, 598, 9 P 2d 474.

Evidence Insufficient To Warrant Murder in First Degree

Defendant, keeper of a roadhouse where intoxicating liquor was sold, several hours after three men, with two of whom he had

had a quarrel, had left the place, and about one o'clock in the morning, was driving in an automobile to a neighboring town when he observed the car of the three stalled in the road. A fight ensued with the two with whom he had quarreled, in the course of which he killed one. His defense was self-defense. While the testimony of the other two made little mention of an encounter, the ground where the shooting occurred showed evidence of a desperate struggle; it also appeared that defendant, among other injuries, sustained a broken leg and was confined in a hospital for nearly six months. Held, that the evidence was insufficient to sustain a verdict of murder in the first degree. State v. Gunn, 85 M 553, 555, 281 P 757.

Evidence reviewed and held insufficient to warrant a verdict of murder in the first degree, the state having failed to sustain the burden resting upon it to establish the killing by the defendant, who had pleaded self-defense, with deliberation and premeditation, but sufficient, in view of the rule that a verdict of murder in the first degree necessarily implies the finding of all the essential elements of murder in the second degree, to establish the latter crime. State v. Gunn, 89 M 453, 463, 300 P 212.

Felony-Murder Rule

Where homicide is committed in the perpetration of or attempt to perpetrate robbery, the result is murder in the first degree, irrespective of the absence of intent to commit the latter crime, it being sufficient for conviction if he was capable of entertaining the felonious intent to commit robbery. State v. Reagin, 64 M 481, 490, 210 P 86.

Where two defendants, tried separately, had entered into a conspiracy to commit robbery by taking incriminating evidence from the possession of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. State v. Bolton, 65 M 74, 81, 212 P 504.

65 M 74, 81, 212 P 504.

Under this section, making all murder committed in the perpetration of or attempt to perpetrate any of the crimes therein mentioned murder in the first degree, an information charging that the killing was willful, deliberate, premeditated and with malice aforethought is sufficient to admit of proof that the killing was committed in the perpetration or attempt to perpetrate any one of such felonies. State v. Bolton, 65 M 74, 81, 212

P 504.

Where defendant, after robbing a bank, escaped in an automobile with the money, pursuit being at once begun and continued uninterruptedly for about thirty miles, and shot one of the pursuers, an instruction that if the jury believed that defendant committed the crime of robbery and while escaping killed deceased, he was guilty of murder in the first degree, was proper under this section, the robbery at the time of the shooting having then still been in the process of commission. State v. Jackson, 71 M 421, 428, 230 P 370.

All who participate in a robbery, or an attempted robbery, during which a homicide is committed, are guilty of murder in the first degree, irrespective of which one of the participants fired the fatal shot. State v. Miller, 91 M 596, 598, 9 P 2d 474.

Evidence in a prosecution for murder committed at nighttime in the perpetration of burglary, supported by a full confession by defendant, held sufficient to warrant the extreme penalty. State v. Zorn, 99 M 63, 71, 41 P 2d 513.

Where the evidence disclosed that the defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony-murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first degree murder. State v. Morran, 131 M 17, 306 P 2d 679.

Information reciting commission of robbery and alleging that in perpetration of robbery, defendant killed deceased, charged murder in first degree as against defendant's contention that information charged him with two separate and distinct crimes, that of robbery and premeditated murder. In re Petition of Dixson, 149 M 412, 430 P 2d 642.

Under felony-murder rule, both parties were guilty of murder in first degree where evidence clearly showed that both had kidnaped and robbed victim even though evidence did not clearly show which of two shot and killed victim. State v. Corliss, 150 M 40, 430 P 2d 632.

First and Second Degrees Distinguished

In murder prosecution, jury was properly instructed that if it found that killing was unlawfully done by defendant with deliberation, premeditation and malice aforethought, defendant was guilty of murder in first degree but if it believed that killing was unlawfully done with malice aforethought, although not deliberate and premeditated, or that defendant was incapable of premeditation and deliberation because of intoxication at time of killing, then crime was second degree murder. State v. Brooks, 150 M 399, 436 P 2d 91.

Guilty of Lesser Offense

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 288.

Instructions on Degrees of Murder

In a prosecution for murder in the first degree, appellant may not complain of the failure of the court to instruct on the subjects of manslaughter or murder of the second degree in the absence of an offer by him of instructions on those subjects. State v. Reagin, 64 M 481, 490, 210 P 86.

Murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., is murder of the first degree, and murder so committed is not divisible into degree; hence the court need not in such a prosecution instruct as to murder of the second degree or manslaughter. State v. Reagin, 64 M 481, 490, 210 P 86.

Where a homicide is committed in the perpetration of or attempt to perpetrate any of the crimes mentioned in this section, it is murder in the first degree, and the court need not, in its instructions, define murder of the second degree, or manslaughter. State v. Bolton, 65 M 74, 81, 212 P 504.

As a general rule the district court, in a trial for homicide, need not give an instruction on second degree murder where the killing is charged to have been perpetrated in the commission of one of the felonies enumerated in this section, or where there is no evidence tending to show a lesser offense than murder in the first degree. State v. Le Duc, 89 M 545, 562, 300 P 919.

Held, under the evidence, that the trial court did not err in giving an instruction on murder in the second degree, as against the contention of defendant that under his plea of self-defense he was either guilty of murder in the first degree or not guilty. (Mr. Justice Angstman dissenting.) State v. Le Duc, 89 M 545, 562, 300 P 919.

Where defendant was convicted of murder in the second degree, he was not prejudiced by an instruction that the deliberation and premeditation necessary to raise the crime to murder in the first degree may be formed in an instant, even though it be assumed that the instruction was erroneous. State v. Le Duc, 89 M 545, 562, 300 P 919.

In a prosecution for crime including offenses of lesser degree than that charged, the jury need not be instructed on such lesser degrees unless the evidence would warrant a conviction of such other crimes. State v. Miller, 91 M 596, 598, 9 P 2d 474.

Where the evidence in a prosecution for homicide discloses that the crime was committed during a robbery or an attempt to commit it, or fails to show that fact beyond a reasonable doubt, the only permissible verdict, under this section, on the one hand, is one of murder in the first degree, or, on the other, of acquittal, and under such conditions the court is not required to instruct on murder in the second degree; the rule is the same where the state relies on circumstantial evidence for conviction. State v. Miller, 91 M 596, 598, 9 P 2d 474.

Lying in Wait

Where defendant had robbed a bank and in the course of his escape drove his automobile into a coulee, stopped his machine and when deceased, one of the pursuers, appeared on the top of a hill, shot him, an instruction that homicide committed by lying in wait constitutes murder in the first degree was correct. State v. Jackson, 71 M 421, 428, 230 P 370.

Second Degree Murder

To constitute murder in the second degree it is not necessary that the specific intent to take life must have accompanied the act of killing. If the killing was done unlawfully with malice aforethought it is sufficient; hence where one fires at the assailant of another but by reason of poor marksmanship or change of position of the combatants kills the one whom he sought to protect, the crime is murder in the second degree. State v. Chavez, 85 M 544, 550, 281 P 352.

Defendant convicted of murder in the second degree on appeal contended that the evidence warranted a verdict of guilty of no greater crime than manslaughter. Evidence showing that defendant, angry at being awakened from sleep by a quarrel in an adjoining room between his cousin and one of the three other men there present, intentionally fired three bullets into the room either in reckless disregard of the safety of the men or directly at the cousin or at the man with whom he was fighting, killing the cousin held sufficient to warrant a verdict of guilty of murder, in the second degree. State v. Chavez, 85 M 544, 550, 281 P 352.

Sufficiency of Charge

It is not necessary to allege that the acts of the accused were done deliberately to sustain a conviction of murder of the first degree, and allegations sufficient for a common-law indictment will be sufficient for an information. State v. Lu Sing, 34 M 31, 35, 85 P 521. See also State v. McGowan, 36 M 422, 428, 93 P 552; State v. Wolf, 56 M 493, 496, 185 P 556.

Collateral References

Homicide ≈ 22 (1-3), 23 (1), (2). 40 C.J.S. Homicide §§ 31, 33, 34, 35. 40 Am. Jur. 2d 333 et seq., Homicide, § 44 et seq.

Homicide: causing one, by threats or fright, to leap or fall to his death. 25 ALR 2d 1186.

94-2504. (10956) Repealing clause. All acts and parts of acts in conflict herewith are hereby repealed; provided, that nothing herein contained shall be construed to relieve any person from prosecution for murder which shall have been committed prior to the approval of this act, but the same shall be prosecuted under the provisions of the preceding section, notwith-standing such repeal, and said section shall be continued in force for the purpose of such prosecutions only.

History: En. Sec. 2, Ch. 3, L. 1919; re-en. Sec. 10956, R. C. M. 1921.

Collateral References

Homicide ← 8.
40 C.J.S. Homicide § 13.
40 Am. Jur. 2d 297, Homicide, § 3.

94-2505. (10957) Punishment for murder. Every person guilty of murder in the first degree shall suffer death, or shall, in the discretion of the jury, or of the court, if the punishment be left to the court, be imprisoned in the state prison for the term of his natural life; and every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years.

History: Earlier acts were Sec. 17, p. 179, Bannack Stat.; Sec. 25, p. 274, Cod. Stat. 1871; Sec. 25, 4th Div. Rev. Stat. 1879; Sec. 25, 4th Div. Comp. Stat. 1887; Sec. 353, Pen. C. 1895.

This section en. Sec. 1, Ch. 179, L. 1907; Sec. 8293, Rev. C. 1907; re-en. Sec. 10957, R. C. M. 1921. Cal. Pen. C. Sec. 190.

Bail

First degree murder is a bailable capital offense except in cases where it has been shown that the proof is evident or the presumption great. State v. Zachmeier, — M —, 453 P 2d 783.

Commutation of Sentence

Inmate of state prison, who along with his codefendant had been sentenced to life imprisonment on plea of guilty to first degree murder, was not entitled to release from custody because his codefendant had been released from prison after commutation of his sentence by the governor. Goff v. State, 139 M 641, 367 P 2d 557, 558.

Operation and Effect

Where the accused, in a prosecution for murder, fails to raise in the minds of the jurors a reasonable doubt as to his guilt, the jury is justified in finding the highest degree of the crime, and in fixing the death penalty. State v. Leakey, 44 M 354, 366, 120 P 234.

Where there is evidence sustaining finding by trial court of murder in the first degree supreme court will not interfere with trial court's determination and the sentence of death. State v. Palen, 120 M 434, 186 P 2d 223, 224.

Sentence for Second-Degree Murder

Second-degree murder sentence of forty years in state prison imposed by trial judge, was not unduly harsh and unreasonable and was authorized by statute. State v. Brooks, 150 M 399, 436 P 2d 91.

Collateral References

Homicide \$\infty 354.
41 C.J.S. Homicide \$\\$ 433-436.
40 Am. Jur. 2d 813 et seq., Homicide,
\$ 552 et seq.

94-2506. (10958) Petit treason abolished. The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter.

History: En. Sec. 354, Pen. C. 1895; re-en. Sec. 8294, Rev. C. 1907; re-en. Sec. 10958, R. C. M. 1921. Cal. Pen. C. Sec. 191.

Collateral References
Homicide \$\infty 1.
40 C.J.S. Homicide \$ 2.

94-2507. (10959) Manslaughter—voluntary and involuntary. Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary, upon a sudden quarrel or heat of passion.

2. Involuntary, in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.

History: Prior to 1895, the law governing manslaughter and excusable and justifiable homicide differed materially from the present law. See Secs. 18-31, pp. 179-181, Bannack Stat.; re-en. as Secs. 26-38, pp. 274-276, Cod. Stat. 1871; re-en. as Secs. 26-38, 4th Div. Rev. Stat. 1879; re-en. as Secs. 26-38, 4th Div. Comp. Stat. 1887. This section en. Sec. 355, Pen. C. 1895;

re-en. Sec. 8295, Rev. C. 1907; re-en. Sec. 10959, R. C. M. 1921, Cal. Pen. C. Sec. 192.

Subd. 1

Instructions

Where there is evidence showing defendant to be guilty of either murder of the first or second degree or manslaughter, the court must explicity instruct the jury that a verdict of manslaughter may be returned, under the rule that where the evidence warrants it, instructions must be given upon every offense included in the crime charged. State v. Mumford, 69 M 424, 435, 222 P 447.

An information charging that defendant "did willfully, unlawfully, knowingly and feloniously kill one B., a human being, contrary to the form," etc., was sufficient to charge manslaughter, as against the objection that it was fatally defective in not alleging that the crime had been either voluntarily or involuntarily committed. State v. Gondeiro, 82 M 530, 538, 268 P 507, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Where judge instructed the jury in the language of the statute thereby giving the jury the definitions of both voluntary and involuntary manslaughter, defendant could not complain on ground there was no evidence of voluntary manslaughter in the case where the jury found him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 289.

Where defendant was charged with second degree murder but the court withdrew the murder charge from the jury and presented the question of the guilt or innocence of the defendant for the crime of manslaughter, an instruction charging the jury that the state must prove the "intent" alleged in the information could properly have been modified to apply to the crime of manslaughter, however, conviction will not be set aside where it appears that no prejudice resulted. State v. Allison, 122 M 120, 199 P 2d 279, 291.

Where evidence showed that defendant was drunk and that he drove his automobile at a high rate of speed into the rear of another automobile going the same direction, causing it to catch fire and killing the occupants, the contention of defendant that he could not remember the events which transpired at that time did not establish an accident and instruction on responsibility for deaths caused by accident was not necessary. State v. Souhrada, 122 M 377, 204 P 2d 792, 796.

In prosecution for involuntary manslaughter the issue is one of criminal negligence rather than intent and giving of instruction that "intent is not an element of involuntary manslaughter" was not erroneous. State v. Souhrada, 122 M 377, 204 P 2d 792, 797.

Since the word "feloniously" is not necessary in the information it was not necessary that the word "feloniously" be defined by the court's instructions and court's erroneous definition could not have been prejudicial particularly where other instructions clearly advised the jury of

the elements of the crime. State v. Souhrada, 122 M 377, 204 P 2d 792, 797.

Where the court instructed the jury that in order to find the defendant guilty it must find that the defendant committed an unlawful act, not amounting to a felony, and that the unlawful act was the proximate cause of the injury and death; and then in a later instruction defined criminal negligence as such that amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference of the safety or rights of others, the instructions taken as a whole are correct. For while the former may, standing alone, be inaccurate or even erroneous, yet as qualified and explained by other portions of the charge, in pari materia, it fully and fairly submits the case to the jury. State v. Bosch, 125 M 566, 242 P 2d 477, 480.

Motion Requiring State To Elect between Voluntary and Involuntary Manslaughter

Motion of defendant, charged with manslaughter, at the close of the state's cause, requiring the state to elect as to the kind of manslaughter it was relying upon, whether voluntary or involuntary, held, properly denied, where the character of the evidence introduced by the prosecution showed that it was attempting to make a case of involuntary manslaughter, and that defendant at no time had any reasonable ground for assuming that his defense would have to be other than for such offense. State v. Robinson, 109 M 322, 328, 96 P 2d 265, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Murder and Manslaughter Distinguished

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at time of killing that he was incapable of harboring malice aforethought, then crime was manslaughter. State v. Brooks, 150 M 399, 436 P 2d 91.

Purpose

This section is a recognition of the frailty of human nature, and has as its purpose to reduce a homicide committed under the circumstances therein contemplated to the grade of manslaughter. State v. Messerly, 126 M 62, 244 P 2d 1054, 1056.

Sufficiency of Charge

Information for manslaughter against driver of death car was sufficient where it was in the prescribed form, complied with rules of pleading, and met the tests provided by section 94-6412 (since repealed).

State v. Haley, 132 M 366, 318 P 2d 1084,

Verdict of Manslaughter on Charge of Murder

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 288.

Subd. 2

Acts of Omission

Omission to perform an act required by law can be the basis for manslaughter. Hence, where evidence disclosed that a child, 5 months old, died due to starvation, and that his weight at death was only 5 pounds 14 ounces which was but ten ounces over his birth weight, and that the father and mother had the means with which to care for the child, the evidence would be sufficient to support the conviction of the parents for manslaughter. State v. Bischert, 131 M 152, 308 P 2d 969.

The failure to obtain medical aid for

one who is owed a duty is a sufficient degree of negligence as to constitute involuntary manslaughter provided death results from the failure to act. State v. Mally, 139 M 599, 366 P 2d 868, 872.

Burden of Proof

The state, in prosecuting for manslaughter because of the failure to provide medical aid, is not required as an element of their proof to show the ability on behalf of the defendant to furnish such aid. If a defendant could not obtain aid either through normal procedure or the poor laws, this is a matter for his defense. State v. Mally, 139 M 599, 366 P 2d 868, 872.

Commission of an Unlawful Act

To warrant conviction of the crime of involuntary manslaughter by reason of the commission of an unlawful act, it must appear that the doing of the unlawful act contributed to or was the proximate cause of the death. State v. Darchuck, 117 M 15, 17, 156 P 2d 173.

Criminal Negligence

It must be remembered that criminal liability cannot be predicated on every careless act merely because such carelessness results in injury to another. The mere happening of an accident, standing alone, is not proof of negligence. Evidence in a manslaughter prosecution showing that defendant driver, blinded by bright lights of an approaching car, drove off the highway into a shallow depression hidden by brush filled with a pile of rocks, causing the car to sideswipe a tree, held

insufficient to sustain conviction on theory of criminal negligence. State v. Bast, 116 M 329, 337, 151 P 2d 1009.

In so far as the offense of involuntary manslaughter is concerned, the proof of culpability is supplied by evidence of criminal negligence. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point in State v. Pankow, 123 M 519, 525, 333 P 2d 1017, 1021.

It is wholly unnecessary in involuntary manslaughter cases to superimpose upon the requirement of the element of criminal negligence the further requirement that a determination must be made as to whether the act resulting in death might ordinarily be classified as malum in se or merely malum prohibitum, for, if the act is done in a manner which is criminally negligent, it thereby becomes malum in se and thereby includes the element of mens rea. State v. Strobel, 130 M 442, 304 P 2d 606, 617, overruled on another point in State v. Pankow, 134 M 519, 525, 333 P 2d 1017, 1021.

Willful or evil intent is not an element of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017, 1021.

Driving While Intoxicated

Defendant was properly convicted of involuntary manslaughter since driving automobile on public highway while intoxicated is an "unlawful act" within meaning of statute, notwithstanding contention that since defendant was a juvenile and "delinquent child" within meaning of Juvenile Act (10-601 et seq.), he could only be punished civilly for his acts. State v. Medicine Bull, — M —, 445 P 2d

"In An Unlawful Manner, or Without Due Caution or Circumspection"

There must be a higher degree of negligence than is required to establish negligent default on a mere civil issue to impose criminal responsibility under the phrase in this section "in an unlawful manner, or without due caution or circum-spection." The negligence must be aggravated, culpable, gross, or reckless, such a departure from the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard for human life or an indifference to consequences. Judgment in case at bar reversed for failure to prove the requisite negligence. State v. Powell, 114 M 571, 576, 138 P 2d 949.

A willful or evil intent is not a requirement of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017,

Negligent Handling of Firearm

The negligent handling of a loaded firearm causing or contributing to the death of another person, is involuntary manslaughter within the meaning of subdivision 2 of this section. State v. Kuum, 55 M 436, 446, 178 P 288.

Photographs in Evidence

In a prosecution of defendant for failure to provide food to an infant child which resulted in the child's death, it was error to admit into evidence photographs of the body of the child which showed ghastly and gruesome-looking sores or scars alleged to have been caused by dermatitis. The charge was for failure to provide food and not for the failure to provide medical care and such photographs in no way went to the proof of starvation. Their purpose could only arouse the human feelings of the jury without aiding them in further understanding the crime charged. State v. Bischert, 131 M 152, 308 P 2d 969, 973.

Sufficiency of Evidence

Where defendant had invited another person to stay or "bunk" with him for the night, and thereafter, while in his tavern, shot through the screen and door of his bedroom striking such person who was on the other side of the door, jury was justified in returning a verdict of guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 289.

Defendant who deliberately drove his car around curve at a speed which he must have known was dangerous to human lives, those of himself and his passengers, was properly convicted of involuntary manslaughter. State v. Pankow, 134 M 519, 333 P 2d 1017, 1019.

In order to convict a person for manslaughter because of failure to provide medical aid it must appear from the evidence that the defendant's failure to obtain medical aid was the proximate cause of death. State v. Mally, 139 M 599, 366 P 2d 868, 872.

Evidence of intoxication, based on testimony of arresting officer that defendant was glassy-eyed, had smell of alcohol on his breath and had physical appearance indicating intoxication, and on testimony of companion of defendant that defendant had been drinking when they met and that, while together, defendant had seven or eight beers, and on testimony of witness at scene of accident that defendant was unstable, could not walk very well and was very clumsy, was sufficient evidence to support verdict of involuntary manslaughter notwithstanding defendant's evidence that he had been knocked unconscious which resulted in his clumsy and awkward physical condition and that faulty mechan-

ical condition of his pickup truck was proximate cause of decedent's death. State v. Medicine Bull, — M —, 445 P 2d 916.

Collateral References

Homicide@=31, 33, 34.

40 C.J.S. Homicide §§ 37, 39, 40, 43, 44, 55-57, 116.

55-57, 116. 40 Am. Jur. 2d 348, 349, Homicide, §§ 54, 55.

Negligent homicide by overturning boat. 3 ALR 1104.

Wanton or reckless use of firearm without express intent to inflict injury. 5 ALR 603 and 23 ALR 1554.

Improper treatment of disease. 9 ALR 211

Wife's confession of adultery as affecting degree of homicide in killing her paramour. 10 ALR 470.

Guilt of one aiding or abetting suicide. 13 ALR 1259.

Evidence in prosecution for homicide in attempting to produce abortion, of dying declarations with respect to transactions prior to the homicide. 14 ALR 760

Homicide in defense of habitation or property. 25 ALR 508; 32 ALR 1541 and 34 ALR 1488.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 ALR 921.

Airplane, manslaughter by negligence in handling. 69 ALR 337; 83 ALR 408 and 99 ALR 173.

Intoxication as reducing homicide from murder to manslaughter. 79 ALR 904.

Homicide in connection with negligence in operation of automobile or its use for unlawful purpose or in violation of law. 99 ALR 756.

Test or criterion terms "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter. 161 ALR 10.

Criminal responsibility for death resulting from hunting accident. 23 ALR 2d 1401.

Killing by set gun or similar device on defendant's own property. 44 ALR 2d 383. Pregnancy as element of abortion or

homicide based thereon. 46 ALR 2d 1393.
Criminal responsibility of druggist for death in consequence of mistake 55 ALR

death in consequence of mistake. 55 ALR 2d 714.

Criminal responsibility of motor vehicle operator for fatal accident arising from physical defect, illness, drowsiness, or falling asleep. 63 ALR 2d 983.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis. 89 ALR 2d 396.

Homicide by failure to provide medical or surgical attention, 100 ALR 2d 483.

HOMICIDE 94-2510

94-2508. (10960) Punishment for manslaughter. Manslaughter is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 356, Pen. C. 1895; re-en. Sec. 8296, Rev. C. 1907; re-en. Sec. 10960, R. C. M. 1921. Cal. Pen. C. Sec. 193.

94-2509. (10961) Deceased must die within a year and a day. To make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

History: En. Sec. 23, p. 180, Bannack Stat.; re-en. Sec. 30, p. 275, Cod. Stat. 1871; re-en. Sec. 30, 4th Div. Rev. Stat. 1879; re-en. Sec. 30, 4th Div. Comp. Stat. 1887; re-en. Sec. 357, Pen. C. 1895; re-en. Sec. 8297, Rev. C. 1907; re-en. Sec. 10961, R. C. M. 1921. Cal. Pen. C. Sec. 194.

Operation and Effect

It is not necessary to allege in an information for murder the date upon which the death occurred as distinguished from

the date of assault. All that is necessary in order to constitute the crime of murder, the other requisite facts being proven, is that the death of the party occurred within a year and a day after the stroke received or the cause of death administered. State v. Powers, 39 M 259, 267, 102 P 583.

Collateral References

Homicide ←6. 40 C.J.S. Homicide § 12. 40 Am. Jur. 2d 305, Homicide, § 14.

94-2510. (10962) **Proof of corpus delicti.** No person can be convicted of murder or manslaughter unless the death of the person, alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof, and the latter beyond a reasonable doubt.

History: En. Sec. 358, Pen. C. 1895; re-en. Sec. 8298, Rev. C. 1907; re-en. Sec. 10962, R. C. M. 1921.

Cross-Reference

Proof in homicide cases, secs. 94-7212, 94-7213.

Applies Only to Homicide

Held, that the corpus delicti in all criminal prosecutions (except in cases of homicide, this section) need not be established by direct and positive proof but may be proved by circumstantial evidence, and that in the instant case (burglary) it was so proven, the fact that there was no evidence to show how the entry was made being immaterial. State v. Dixson, 80 M 181, 192, 260 P 138.

Proof of corpus delicti must be by direct evidence only in homicide cases; in all other cases it may be established by circumstantial evidence; in prosecution for knowingly receiving a stolen calf, testimony by alleged thief was sufficient. State v. Webber, 112 M 284, 292, 116 P 2d 679

Death Established by Direct Evidence

Where, on a trial for murder, the identity of the person alleged to have been

killed was proved by the direct evidence of an accomplice, who was an eye-witness, and the death of a human being was directly proved, and there was circumstantial evidence to prove the identity of the deceased, the evidence was sufficient to satisfy the requirements of this section, that the "death" of the person alleged to have been killed must be established by "direct proof," as an independent fact, and of section 93-301-9. State v. Calder, 23 M 504, 508, 59 P 903.

Under this section, the only fact re-

Under this section, the only fact required to be proved directly to establish the corpus delicti in a murder case is the death of the person alleged to have been killed, but the identity of such person, if in doubt, and the fact that defendant did the killing may be proved by direct, or by indirect or circumstantial evidence. State v. Kindle, 71 M 58, 64, 227 P 65.

Direct Proof of Victim's Identity Unnecessary

Since the corpus delicti is directly proved when a dead body is found under circumstances warranting an inference that a person has been feloniously killed, direct proof of the identity of the victim is not required, but only direct proof of death. State v. Pepo, 23 M 473, 481, 59 P 721.

In a prosecution for murder, this section does not require direct proof of the identity of the victim, or of the fact that the killing was done by the defendant, but only of the fact of death. State v. Nordall, 38 M 327, 338, 99 P 960.

Fact of Murder Must Be Established

In prosecutions for murder, proof of the corpus delicti involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused. State v. Calder, 23 M 504, 513, 59 P 903; State v. Nordall, 38 M 327, 338, 99 P 960; State v. Riggs, 61 M 25, 52, 201 P 272.

Where Corpus Delicti Sufficiently Estab-

The circumstances presented, together with the confession, held amply to meet the requirements of this section in sufficiently establishing the corpus delicti to sustain the finding of the jury. State v. Ratkovich, 111 M 19, 24, 105 P 2d 679, overruled on other grounds in State v. Campbell, 146 M 251, 259, 405 P 2d 978.

Collateral References

Homicide €=228 (1). 41 C.J.S. Homicide § 312. 40 Am. Jur. 2d, Homicide, p. 297, § 4; pp. 549-551, §§ 284, 285.

94-2511. (10963) Excusable homicide. Homicide is excusable in the following cases:

- 1. When committed by accident or misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
- 2. When committed by accident or misfortune, in the heat of passion, upon any sudden or sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in any cruel or unusual manner.

History: En. Sec. 359, Pen. C. 1895; re-en. Sec. 8299, Rev. C. 1907; re-en. Sec. 10963, R. C. M. 1921, Cal. Pen. C. Sec. 195.

Exercise of Caution Jury Question

The question whether defendant, while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by this section to render the killing excusable, was one for the determination of the jury. State v. Kuum, 55 M 436, 446, 178 P 288.

Instructions

Refusal to give instruction under this section was not reversible error in view of other instructions given. State v. Allison, 122 M 120, 199 P 2d 279, 289.

Operation and Effect

To justify a finding that a homicide by shooting was excusable, where defendant and deceased were strangers, the evidence must show that, when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent. State v. Kuum, 55 M 436, 444, 178 P 288.

Collateral References

Homicide = 101, 125. 40 C.J.S. Homicide §§ 1, 97-99, 107, 112, 116.

40 Am. Jur. 2d 405 et seq., Homicide, § 110 et seq.

Misdemeanor, degree of force that may be employed in arresting one charged with. 3 ALR 1170 and 42 ALR 1200.

Homicide in attempting to prevent elopement, 8 ALR 660.

Violation of law only casually related

to the encounter as affecting right of self-defense. 10 ALR 861. Religious belief as defense to prosecution for homicide because of failure to provide medicine or surgical attention.

10 ALR 1146. Duty to retreat when not on one's own premises. 18 ALR 1279.

Peace officers' criminal responsibility for killing or wounding one whom they wished to investigate or identify. 18 ALR 1368 and 61 ALR 321.

Homicide in defense of habitation or property. 25 ALR 508; 32 ALR 1541 and 34 ALR 1488.

Humanitarian motives for homicide. 25 ALR 1007.

Dying declaration justifying or excusing accused. 25 ALR 1394 and 86 ALR 2d 905. Officer attempting illegal arrest, right of self-defense of. 46 ALR 904.

Office or place of business or employment, duty to retreat as condition of selfdefense when one is attacked at. 47 ALR 418.

Extent of premises which may be defended without retreat under right of self-defense. 52 ALR 1458.

Negligent homicide as affected by negligence or other misconduct of decedent. 67 ALR 922.

Unloaded firearm as dangerous weapon within rule as to right of self-defense. 74 ALR 1212.

Intoxication as affecting defense of provocation. 79 ALR 906.

Instruction applying rule of reasonable doubt to defendant's claim of self-defense as curing instruction placing burden of

proof upon defendant in that regard. 120

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

Criminal responsibility for death resulting from hunting accident. 23 ALR 2d

Homicide by use of set gun, trap, or similar device on defendant's own property. 44 ALR 2d 398.

- (10964) Justifiable homicide by public officers. Homicide is 94-2512. justifiable when committed by public officers, and those acting by their command in their aid and assistance, either:
 - 1. In obedience to a judgment of a competent court; or
- When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
- 3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such

History: Ap. p. Sec. 28, p. 181, Bannack Stat.; re-en. Sec. 35, p. 275, Cod. Stat. 1871; re-en. Sec. 35, 4th Div. Rev. Stat. 1879; re-en. Sec. 35, 4th Div. Comp. Stat. 1887; en. Sec. 360, Pen. C. 1895; re-en. Sec. 8300, Rev. C. 1907; re-en. Sec. 10964, R. C. M. 1921. Cal. Pen. C. Sec. 196.

Collateral References

Homicide = 101, 104, 105. 40 C.J.S. Homicide §§ 1, 97-99, 102, 106, 107, 116, 137.

40 Am. Jur. 2d 424 et seq., Homicide, § 134 et seq.

Degree of force that may be employed in arresting one charged with misdemeanor. 3 ALR 1170 and 42 ALR 1200.

Peace officers' criminal responsibility for killing or wounding one whom they wish to investigate or identify. 18 ALR 1368 and 61 ALR 321.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

- 94-2513. (10965) Justifiable homicide by other persons. Homicide is also justifiable when committed by any person in any of the following cases:
- 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
- 2. When committed in defense of habitation, property, or person, against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
- When committed in the lawful defense of such person, or of a wife, or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,
- 4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

History: En. Sec. 361, Pen. C. 1895; re-en. Sec. 8301, Rev. C. 1907; re-en. Sec. 10965, R. C. M. 1921. Cal. Pen. C. Sec. 197.

Defense of a Wife

On the issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife—defendant's sister—testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife, was admissible, and the fact that the prior assaults occurred before November 30th, while the homicide occurred December 15th, did not make the evidence inadmissible as too remote. State v. Felker, 27 M 451, 458, 71 P 668.

Defense of Others

The provisions of this section put persons acting in defense of others upon the same plane as those acting in defense of themselves. Every fact, therefore, which would be competent to establish justification in the one case would, for the same reasons, be competent to establish it in the other. State v. Felker, 27 M 451, 458, 71 P 668.

Prior Threats Admissible

Testimony of prior threats by deceased, though not communicated to defendant, was admissible. State v. Felker, 27 M 451, 460, 71 P 668. See also State v. Hanlon, 38 M 557, 571, 100 P 1035; State v. Whitworth, 47 M 424, 435, 133 P 364.

Self-Defense

Where, on a trial for murder, in which the accused pleaded self-defense, it was shown that the deceased had previously threatened the accused, an instruction directing the jury to disregard such prior threats unless the accused, at the time of the killing, was actually assailed, or believed he was in great bodily danger, was erroneous. State v. Shadwell, 26 M 52, 55, 66 P 508. See also State v. Hanlon, 38 M 557, 570, 571, 100 P 1035; State v. Whitworth, 47 M 424, 435, 133 P 364; State v. Jones, 48 M 505, 519, 139 P 441.

Where the trial court, in a prosecution for murder, instructed the jury that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, the charge conformed to the requirements of this section, and was sufficient. State v. Houk, 34 M 418, 423, 87 P 175.

Under this section and the following section, if the party committing the homicide was the assailant, or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, otherwise he cannot invoke self-defense. State v. Merk, 53 M 454, 460, 164 P 655.

A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless. State v. Merk, 53 M 454, 460, 164 P 655.

A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant. State v. Merk, 53 M 454, 460, 164 P 655.

One claiming self-defense in a prosecution for murder had a right to act upon appearances and determine for himself whether there was real danger to himself from decedent, and he should be allowed to prove every fact and circumstance known to him and connected with decedent which was fairly calculated to create an apprehension for his own safety when attacked by the latter. State v. Jennings, 96 M 80, 88, 28 P 2d 448.

Where defendant charged with murder at the time of the affray was sitting in a pool hall with his back to the wall, on one side of him a hot stove, and on the other a table, so that there was no avenue of escape when deceased, a much larger man than defendant, and who had threatened to kill him, approached from the from and struck at defendant with a castiron cuspidor, whereupon defendant drew a small pocketknife and inflicted several wounds upon his assailant, one of which penetrated the brain tissue, the trial court committed error in refusing an offer of proof to show that defendant prior to the affray had been advised by the offered witness that he had been severely cut by deceased about a year prior to defendant's encounter with him. State v. Jennings, 96 M 80, 88, 28 P 2d 448.

Where defendant pleading self-defense to a charge of murder was a much smaller and weaker man than deceased, the fact that after the first blow the latter lost his weapon did not deprive defendant of his right to claim self-defense in thereafter retaliating with a knife, since in view of the disparity in physique he could reasonably apprehend great bodily harm to himself even though his assailant was unarmed. State v. Jennings, 96 M 80, 88, 28 P 2d 448.

If homicide is to be justified by self-defense, there must be evidence that party doing killing acted under influence of reasonable fear that someone was going to be murdered or seriously injured; court thus properly refused defendant's instruction relative to self-defense where there was no evidence whatever that defendant acted under reasonable apprehension of death or great bodily harm and where wit-

nesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. State v. Brooks, 150 M 399, 436 P 2d 91.

Collateral References

Homicide € 109 et seq. 40 C.J.S. Homicide §§ 114, 135, 136. 40 Am. Jur. 2d, Homicide, p. 405 et seq., § 110 et seq.; p. 429 et seq., § 139 et seq. Homicide in defense of habitation or property. 25 ALR 508; 32 ALR 1541 and 34 ALR 1488.

Humanitarian motives for homicide. 25 ALR 1007.

Negligent homicide as affected by negligence or other misconduct of decedent. 67 ALR 922.

Homicide in commission of felony where the killing was the act of one not a participant in the felony. 12 ALR 2d 210.

94-2514. (10966) Bare fear not to justify killing. A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

History: En. Sec. 26, p. 180, Bannack Stat.; re-en. Sec. 33, p. 275, Cod. Stat. 1871; re-en. Sec. 33, 4th Div. Rev. Stat. 1879; re-en. Sec. 33, 4th Div. Comp. Stat. 1887; amd. Sec. 362, Pen. C. 1895; re-en. Sec. 8302, Rev. C. 1907; re-en. Sec. 10966, R. C. M. 1921, Cal. Pen. C. Sec. 198.

Self-Defense

In a prosecution for murder, where the defendant relies upon the plea of self-defense, an instruction which makes the measure of justification "the sense of danger appearing to the defendant, and to men or individuals of his race," is properly refused. State v. Cadotte, 17 M 315, 320, 42 P 857.

Whether the circumstances attending the homicide claimed by defendant to have been committed in self-defense, were such as to justify his fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, is a question of fact for the jury; bare fear on his part of an assault by the latter, of a quarrelsome and violent disposition, not alone being insufficient to justify the killing. State v. Harkins, 85 M 585, 602, 281 P 551.

Where self-defense is pleaded to a charge of homicide the question whether the circumstances attending it were such as to justify defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffiering great bodily harm at the hands of deceased, is one of fact for the jury. State v. Fine, 90 M 311, 316, 2 P 2d 1016.

If homicide is to be justified by self-defense, there must be evidence that party doing killing acted under influence of reasonable fear that someone was going to be murdered or seriously injured; court thus properly refused defendant's instruction relative to self-defense where there was no evidence whatever that the defendant acted under reasonable apprehension of death or great bodily harm and where witnesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. State v. Brooks, 150 M 399, 436 P 2d 91.

Collateral References

Homicide € 116 (4), 122-124. 40 C.J.S. Homicide §§ 108, 109, 111, 126. 40 Am. Jur. 2d 439 et seq., Homicide § 151 et seq.

94-2515. (10967) Justifiable and excusable homicide not punishable. The homicide appearing to be justifiable or excusable, the person charged must, upon his trial, be fully acquitted and discharged.

History: En. Sec. 32, p. 181, Bannack Stat.; re-en. Sec. 39, p. 276, Cod. Stat. 1871; re-en. Sec. 39, 4th Div. Rev. Stat. 1879; re-en. Sec. 39, 4th Div. Comp. Stat. 1887; amd. Sec. 363, Pen. C. 1895; re-en. Sec. 8303, Rev. C. 1907; re-en. Sec. 10967, R. C. M. 1921. Cal. Pen. C. Sec. 199.

When Requisite Criminal Negligence Not Proved

Evidence in a prosecution for involuntary manslaughter arising out of an automobile accident in city at nighttime, showing defendant driving at 15 miles per hour, that he did not see deceased, that he had not been drinking, that he was

looking straight ahead but saw nothing to indicate the presence of the pedestrian, etc., held insufficient to warrant a verdict of guilty of such reckless disregard of human life as is required to constitute

the offense under section 94-2507, subdivision 2, and judgment reversed with direction to dismiss the information. State v. Powell, 114 M 571, 576, 138 P 2d 949.

CHAPTER 26

KIDNAPING

Section 94-2601. Kidnaping—penalty—place of trial.
94-2602. Kidnaping with intent to send person from state or confine within state—penalty—place of trial.
94-2603. Enticing away child—penalty.
94-2604. Prisoner holding hostage.

94-2601. (10970.1) Kidnaping—penalty—place of trial. If any person or persons shall willfully, without lawful authority, seize, confine, inveigle, decoy, kidnap or abduct or take or carry away by any means whatever, or attempt so to do, any child of any age, or any person or persons and attempt or cause such child or person or persons to be secretly confined against their will, or abducted for the purpose and with the intention of causing the father or mother or any other relative of the person so abducted, or anyone else, to pay or offer to pay any sum as ransom or reward for the return or release of any such child or person or persons, said person or persons so guilty of the above-mentioned acts or act, shall, on conviction, be punished by death or imprisonment in the penitentiary not less than five (5) years, at the option of the court or the jury assessing the punishment. Any person or persons charged with such offense may be tried in any county into or through which the person or child so seized, inveigled, decoyed, kidnaped, abducted or otherwise taken shall have been carried or brought.

History: En. Sec. 1, Ch. 102, L. 1933.

Collateral References

Criminal Law@112 (1); Kidnaping@1. 22 C.J.S. Criminal Law § 177; 51 C.J.S. Kidnaping § 2.

See generally, 31 Am. Jur. 349, Kid-

naping.

Forcing another to transport one as constituting offense of kidnaping or of abduction. 62 ALR 200.

Secrecy, or intent of secrecy, as a necessary element of kidnaping. 68 ALR 719.

Kidnaping or other criminal offense by taking or removing of child by, or under authority of, parent, or one in loco parentis. 77 ALR 317.

Belief in legality of the act as affecting

offense of abduction or kidnaping. 114

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnaping. 17 ALR 2d 1003.

Kidnaping in connection with offense under Federal Bank Robbery Act. 59 ALR

2d 974, 975.

Statutes increasing penalty for kid-naping where victim suffers harm, what is "harm" within provisions of. 11 ALR 3d 1053.

94-2602. (10970.2) Kidnaping with intent to send person from state or confine within state—penalty—place of trial. If any person shall willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten (10) years. Any person charged with such offense may

be tried in any county into or through which the person so seized, inveigled, decoved or kidnaped shall have been taken, carried or brought.

History: En. Sec. 2, Ch. 102, L. 1933.

Question for Jury

Where defendant is charged with kidnaping with intent to secretly confine a prison guard it was a question for the jury whether defendant was acting under duress or coercion because of threats made to him by other convicts participating in riot. State v. Walker, 139 M 276, 362 P 2d 548, 550.

Sufficiency of Charge

An information under this section is sufficient if it contains a statement of facts constituting the offense charged in ordinary and concise language so as to enable a person of common understanding to know what was intended. State v. Randall, 137 M 534, 353 P 2d 1054, 1056.

Charge of "kidnaping with intent to secretly confine" contained in information clearly charged violation of this statute. State v. Corliss, 150 M 40, 430 P 2d 632.

Sufficiency of Evidence

Defendant was guilty of confining prison guard secretly against his will where the evidence showed that defendant, an inmate of the state prison, walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. State v. Frodsham, 139 M 222, 362 P 2d 413, 419.

On the trial of defendant charged with kidnaping with intent to secretly confine a prison guard, a showing of actual physiare not required to prove the force necessary to establish the crime. State v. Walker, 139 M 276, 362 P 2d 548, 550.

(10970.3) Enticing away child—penalty. Every person who shall maliciously, forcibly or fraudulently lead, take or carry away or decoy or entice away any child under the age of twelve (12) years, with the intent to detain or conceal such child from its parent, guardian or other person having the lawful charge of such child, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding twenty (20) years, or in a county jail not less than six (6) months, or by fine not less than five hundred dollars (\$500).

History: En. Sec. 3, Ch. 102, L. 1933.

94-2604. Prisoner holding hostage. Every person committed to the Montana state prison, who, while at such state prison or while being conveyed to or from the Montana state prison, or while at a state prison farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, or while escaping or attempting to escape therefrom, holds as hostage any person within the state prison or who, unlawfully, by force or threat of force holds any person or persons against their will shall be guilty of a felony and shall be imprisoned in the state prison for a term not less than ten (10) years, such term of imprisonment to commence from the time he would have otherwise been released from said prison.

History: En. Sec. 1, Ch. 128, L. 1961.

CHAPTER 27

LARCENY AND FALSIFICATION OF PUBLIC RECORDS AND JURY LISTS

Section 94-2701. Larceny defined.

Uttering fraudulent checks or drafts-evidence. 94-2702.

94-2703. Grand and petit larceny. 94-2704. Grand larceny defined.

94-2704.1. Possession of stolen livestock as evidence of larceny.

94-2705. Petit larceny defined. 94-2706. Punishment of grand larceny.

94-2707. Punishment of petit larceny. 94-2708. Dogs, property. 94-2709. Larceny of lost property.

94-2710. Larceny of written instruments.

94-2711. Value of passage tickets.

Written instruments completed but not delivered.

94-2712. Written instruments completed but not de 94-2713. Severing and removing part of the realty. 94-2714. Larceny and receiving stolen property out Larceny and receiving stolen property out of the state.

94-2715. Conversion by fiduciary, larceny. Verbal false pretense, not larceny. 94-2716.

94-2717. 94-2718. 94-2719. Claim of title, restoration of property as defense.

Larceny of gas or electricity. Larceny of water, gas and electricity.

94-2720. False device for measuring gas, water or electricity.

94-2721. Receiver of stolen property.

Larceny, destruction, etc., of records by officers. Larceny, destruction, etc., of records by others. Offering forged or false instruments to be recorded. 94-2722. 94-2723.

94-2724. 94-2725. Adding names, etc., to the jury lists.

94-2726. Falsifying jury lists, etc.

(11368) Larceny defined. Every person who, with the intent 94-2701. to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either—

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold, or take such possession, custody, or control, any money, property, evidence of debt, or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner, or person entitled to the benefit thereof, steals such property and is guilty of larceny.

History: Earlier acts were Secs. 60-64, p. 188, Bannack Stat.; Secs. 72-76, Cod. Stat. 1871; Secs. 72-76, 4th Div. Rev. Stat. 1879; Secs. 78-82, 4th Div. Comp. Stat. 1887.

This section en. Sec. 880, Pen. C. 1895; re-en. Sec. 8642, Rev. C. 1907; re-en. Sec. 11368, R. C. M. 1921. Cal. Pen. C. Sec. 484.

Cross-References

Description of money in indictment, sec. 94-7240.

Indictment, sec. 94-6420.

Obtaining money by false pretenses as larceny, sec. 94-1805.

Obtaining money by gambling as larceny, sec. 94-2405.

Removal of mortgaged property as larceny, sec. 94-1811.

Sufficiency of evidence, sec. 94-7240.

Agency

Where defendant was sole owner of corporate collection agency which contracted with other corporations to collect debts owed to them, defendant was an agent of the other corporations and was properly charged under that portion of this section covering embezzlement when he did not pay over agreed portions of debts which he collected on behalf of other corporation. State v. Holdren, 143 M 103, 387 P 2d 446.

Criminal Intent

Since, to constitute the crime of larceny there must have been a criminal intent to permanently deprive the owner of the property taken, evidence showing that defendant cashier delivered a liberty bond held in trust by his bank for a subscriber, in behalf of his bank, as collateral security to another bank, with the intention that it should be redeemed within a short time, which was done before the information against him for larceny was filed, held insufficient to support a verdict of guilty. State v. Wallin, 60 M 332, 341, 199 P 285.

Harmless Error

On the trial of defendant charged with committing larceny under this section by "taking" property, introduction of evidence by the state to prove that defendant committed larceny by "secreting" property was not prejudicial error where conviction was on a charge made with evidence which would also support conviction on a charge not made. State v. Rindal, 146 M 64, 404 P 2d 327.

Instructions

Conviction under this section requires proof of specific intent and it was error to give an instruction that "when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him." State v. Garney, 122 M 491, 207 P 2d 506, distinguished in 135 M 139, 147, 337 P 2d 924, 929.

Larceny by Bailee

A partner cannot commit larceny of the funds or property of the partnership of which he is a member; but, until an agreement to form a partnership ripens into a consummation of the agreement, a person who contemplates becoming a partner may become the bailee of his prospective partner, and, if he feloniously appropriates the latter's property to his own use, he may be convicted of larceny as bailee. State v. Brown, 38 M 309, 315, 99 P 954.

Where a party let defendant have a

Where a party let defendant have a check under an agreement that he would use the proceeds in his own business for cashing miners' pay checks and repay the amount on a certain day, the transaction amounted to a loan for exchange and title to the money was transferred to the borrower, the loan to be repaid at some future time. The appropriation of it by the defendant, therefore, to a use other than that for which it was advanced did not render him liable to a prosecution for larceny as bailee under subdivision 2 of this section. State v. Karri, 51 M 157, 162, 149 P 956

Where the legal title to a bond was in a bank as trustee and in the possession of its cashier only by virtue of his office, a prosecution against the latter under subdivision 2 of this section, under a charge of larceny by bailee, could not be maintained. State v. Wallin, 60 M 332, 341, 199 P 285.

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Larceny by Bailee Distinguished from Offense of Officers Neglecting To Pay over Money

Where the evidence was insufficient to support a conviction under the charge of lareeny by bailee provided for by this section, which makes the appropriation and intent the necessary elements, it would have been sufficient under section 94-1502, under which appropriation to one's own use with the intent to deprive the state of its property need not be shown. State v. McGuire, 107 M 341, 346, 88 P 2d 35.

Larceny by Indians on Indian Territory

State district court was without jurisdiction to convict an Indian of larceny which occurred on Indian territory since under Acts of Congress (U. S. C. Tit. 18, secs. 1153, 3242) such an offense is within the exclusive jurisdiction of the United States. State v. Pepion, 125 M 13, 230 P 2d 961.

Larceny or Embezzlement—What Constitutes

Where the secretary-treasurer of a corporation entered into a contract with his principal to sell unsold treasury stock on a commission to be paid only when cash for the stock had been received, and he made fictitious sales, forged notes given in payment, manipulated the books so as to show him entitled to commissions and drew checks against the corporation's account for such commissions although not earned, converting the money to his own use, he violated his duty to his employer, which violation amounted to larceny or embezzlement within the meaning of this section, and his acts constituted a breach of defendant surety company's bond insuring the employer against such acts. Montana Auto Finance Corp. v. Federal Surety Co., 85 M 149, 162, 278 P 116.

Larceny Without Aid of Innuendo

On counterclaim for slander, it was held that homeowners' statements that builder cheated them, stole from them and charged them for labor and materials not furnished, directly charged builder with larceny without aid of innuendo. McCusker v. Roberts, — M — , 452 P 2d 408.

Owner Must Have Been Deprived of Title as Well as Possession To Constitute Larceny

To convict under this section it is necessary to prove that the defendant obtained the money or property in question under

circumstances showing that the owner parted with the title thereto, and not merely with the possession thereof. State v. Dickinson, 21 M 595, 55 P 539.

Proof of Intent

The intent required may be found from the facts and circumstances surrounding the transaction, but the mere existence of an unpaid debt does not demonstrate any intent fraudulently to appropriate the property. State v. Smith, 135 M 18, 334 P 2d 1099, 1102.

Proof of Ownership-Sufficiency

While the ownership of property (livestock) charged to have been stolen must be alleged, its particular ownership is not fit he essence of the crime, the allegation in this behalf being merely a matter of description which does not give character to the act, and the same strictness of proof is not required as in the proof of material facts. State v. Grimsley, 96 M 327, 330, 30 P 2d 85.

In a prosecution for the larceny of calves, allegedly owned by a partnership, evidence, though falling short of technical proof that the two owners were partners, held sufficient to warrant a finding by the jury that the animals were partnership property. State v. Grimsley, 96 M 327, 330, 30 P 2d 85.

Receiving Stolen Property

While one who steals property is not an accomplice of one who receives it knowing it to have been stolen, the two offenses constituting distinct crimes, where the thief and the receiver conspire together in advance of the larceny for one to steal and the other to receive, they are principals, and each is an accomplice of the other. State v. Keithley, 83 M 177, 181, 271 P 449.

Although defendant who apparently advised and encouraged the theft of a calf, under section 94-204 was an accomplice or accessory before the fact and therefore a principal to the actual theft under section 94-6423, abrogating the distinction, and by legal fiction had constructive possession, the state may elect to prosecute him for receiving stolen property since he later obtained physical possession, and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. State v. Webber, 112 M 284, 301, 116 P 2d 679.

Stock Is Subject of Larceny

Shares of corporate stock are property

and the subject of larceny. State v. Letterman, 88 M 244, 254, 292 P 717.

Sufficiency of Charge

The ownership of property is not of the essence of the crime of larceny under this section, which abolishes the distinction recognized at common law between cases where the possession had been unlawfully obtained and those where the possession had been lawful, and an information is not bad for duplicity where it charges that the defendant had money in his possession as agent of three persons which he appropriated to his own use. State v. Mjelde, 29 M 490, 75 P 87.

An indictment charging defendant with larceny as bailee in the words of the statute, and in the form prescribed by former pleading statute, was sufficient, and not open to the objection that it failed to describe the character of the bailment. State v. Brown, 38 M 309, 312, 99 P 954.

An indictment charging the defendant with larceny as bailee must contain an averment of the bailment, but the particulars of the bailment need not be averred. State v. Brown, 38 M 309, 312, 99 P 954.

Defendant was charged with the larceny (common theft) of a certificate of building and loan stock. The theory of the prosecution in making its case was that the theft was accomplished by means of deceit and artifice, and the evidence showed that the complaining witness knowingly parted with title to the certificate in making a new investment in a corporation in the conduct of which defendant was shown to have been guilty of fraud and bad faith. He was convicted of the crime as charged. Held, that the conviction was illegal because of the fatal variance between the crime charged and the proof offered in support thereof, entitling defendant to his discharge. State v. Lund, 93 M 169, 18 P 2d 603.

Information charging defendant, president of a brokerage firm, with larceny as bailee of a sum of money, couched substantially in the language of subdivision 2 of this section, was sufficient and not vulnerable to a general demurrer. State v. Lake, 99 M 128, 136, 43 P 2d 627.

An information laid in the terms of this section, is sufficient without particularity, so long as it enables the defendant to prepare a defense. State v. Fairburn, 135 M 449, 340 P 2d 157.

An information which charges the offense of larceny by a selling agent in the language of this section is sufficient and not vulnerable to a general demurrer; there is no requirement that the agency be detailed, and, as between owners, the amount of money stolen from each need not be particularized. State v. Fairburn, 135 M 449, 340 P 2d 157.

Term "Feloniously" or Its Equivalent Is Essential

In a prosecution for the crime of grand larceny a charge to the jury which omits the terms "feloniously," or any other equivalent words which would indicate to the jury that in larceny a felonious intent is necessary to authorize a conviction, constitutes reversible error. State of Montana v. Rechnitz, 20 M 488, 52 P 264.

An information charging the defendant with grand larceny, in that he "willfully, unlawfully, and feloniously, and with the intent then and there to steal, did take, steal, carry, and drive away" a certain mare and colt, is not open to the objection that it fails to allege that the taking was done with felonious intent-since the term "feloniously" imports criminal intent-but is sufficient both under the common law and under this section and section 94-2704.

State v. Allen, 34 M 403, 406, 87 P 177.
Where, in a prosecution for grand larceny, the court gave a definition of "larceny" in the language of this section, and further characters. further charged the jury that in every crime or public offense there must exist a union or joint operation of act and intent, and that to find defendant guilty it was sufficient to show that he had appropriated the property mentioned in the information "without color of right or au-thority," the instructions were erroneous, for the reason that they omitted the element of felonious or criminal intent. State v. Peterson, 36 M 109, 110, 92 P 302.

Collateral References

Larceny 2.

52A C.J.S. Larceny § 1 (1). 32 Am. Jur. 882 et seq., Larceny, § 2

Married woman's criminal responsibility for stealing from husband. 4 ALR 282 and 71 ALR 1126.

Outlawed liquors as subject of larceny. 11 ALR 1032 and 75 ALR 1479.

Intent to convert property to one's own use or to the use of third person

as element of larceny. 12 ALR 804.

Pendency of charge of larceny as bar to charge in another county of offense involving both felonious breaking and felonious taking of same property. 19 ALR 636.

Asportation which will support charge of larceny of oil or water. 19 ALR 729 and 113 ALR 1284.

"Infamous offense," larceny as, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1011.

Lost property as subject of larceny. 36

ALR 373.

Automobile license plates, criterion of value for purpose of fixing degree of larceny of. 48 ALR 1167.

Verdict on conviction of, which fails to state value of property, sufficiency of. 79 ALR 1180.

Larceny of electrical energy or gas. 113 ALR 1283.

Custody and possession, larceny as affected by distinction between, 125 ALR

Real property or things savoring of real property, larceny of. 131 ALR 146.

Single or separate larceny predicated upon a series of acts over a period of time. 136 ALR 948.

Check, note, etc., or signature thereon, charge of larceny predicated upon fraudulent obtaining of, from the person executing the same. 141 ALR 216.

Embezzlement and larceny, distinction between. 146 ALR 532.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for larceny. 147 ALR 1058.

Taking or appropriation of waste paper or other articles deposited in street with intention to donate to patriotic or other cause, as basis for charge of larceny. 156 ALR 631.

Fixed or controlled price as affecting value of goods for purpose of determining

degree of larceny, 157 ALR 1303. Larceny by a partner, 169 ALR 372.

Single or separate larceny predicated upon stealing property from different owners at the same time. 28 ALR 2d

Gambling or lottery paraphernalia as subject of larceny. 51 ALR 2d 1396.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 ALR 3d 241.

Cotenant taking cotenancy property: larceny. 17 ALR 3d 1394.

Computer programs as property subject to theft. 18 ALR 3d 1121.

(11369) Uttering fraudulent checks or drafts — evidence. Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud shall make or draw or utter or deliver, or cause to be made, drawn, uttered or delivered, any check, draft or order for the payment of money upon any bank or depositary, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has no funds or insufficient funds in or credit with such bank or depositary, or person, or firm, or corporation, for the payment of such check, draft, or order in full upon its presentation, although no express representation is made with the reference thereto, shall upon conviction be punished as follows: If there are no funds in or credit with such bank or depositary, or person, or firm, or corporation, for the payment of any part of such check, draft or order, upon presentation, then in that case the person convicted shall be punished by imprisonment in the state prison not exceeding five (5) years, or by a fine not exceeding five thousand dollars (\$5,000. 00) or by both such fine and imprisonment; if such check, draft or order be for a sum of twenty-five dollars (\$25.00) or less, and there are some but not sufficient funds in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full, then in that case the person so convicted shall be punished by imprisonment in the county jail not exceeding six (6) months, or by a fine not exceeding three hundred dollars (\$300.00) or by both such fine and imprisonment; if such check, draft or order be for a sum greater than twenty-five dollars (\$25.00) and there are some but not sufficient funds in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full upon its presentation, then in that case the person so convicted shall be punished by imprisonment in the state prison not exceeding five (5) years, or by a fine not exceeding five thousand dollars (\$5,000.00) or by both such fine and imprisonment. As against the maker or drawer thereof, the making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud and of knowledge of no funds or insufficient funds, as the case may be, in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment of such check, draft or order in full upon its presentation, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, within five (5) days after receiving notice that such check, draft, or order has not been paid by the drawee. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank, depositary, person, firm or corporation, for the payment of such check, draft or order.

History: En. Sec. 881, Pen. C. 1895; re-en. Sec. 8643, Rev. C. 1907; amd. Sec. 1, Ch. 63, L. 1919; re-en. Sec. 11369, R. C. M. 1921; amd. Sec. 1, Ch. 135, L. 1957. Cal. Pen. C. Sec. 476a.

Evidence Insufficient To Convict

Defendant was convicted of uttering a fraudulent check. The check was post-dated and at the time it was given to the complaining witness he was advised by defendant that he did not then have sufficient funds in the bank on which it was drawn (located outside the state) but that by the time it was received by the bank it would be all right. Held, that the gist of the offense charged under this section being fraudulent intent, the evidence was insufficient to show such intent and that

the representation made was more in the nature of a future promise than that of a misrepresentation of an existing fact and therefore did not warrant conviction. State v. Patterson, 75 M 315, 316, 243 P 355.

Held, that the charge of grand larceny against an attorney committed in issuing worthless checks, claimed by him to have been given without consideration, while intoxicated and to enable him to engage in a gambling game, was not supported by the evidence, as found by the referee. In re McCue, 80 M 537, 553, 261 P 341.

Evidence of Intent

In prosecution for uttering and delivering a fraudulent check evidence was properly received as to other checks drawn on

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prior occasions on banks in which defendant had no account as such testimony tended to show defendant's intent to defraud. State v. Tully, 148 M 166, 418 P 2d 549, 550.

Operation and Effect

Held, that where a person was convicted under this section, the proper procedure for review of errors was by appeal under the statutes and not by seeking at a later date the common-law writ of coram nobis. Were it shown that the defendant's case was exigent, as for example, that although innocent of any crime he was nevertheless arbitrarily sentenced and wrongfully imprisoned under that sentence, and if then the existing remedies by appeal as pre-scribed by our statutes and as well the usual writs to which this court customarily turns to prevent an injustice were found in truth inadequate, the court would not hesitate to design a further remedial writ so that the court could meet the emergency and attain the ends of justice, otherwise denied. State v. Zumwalt, 129 M 529, 291 P 2d 257, 260. (Dissenting opinion, 129 M 529, 291 P 2d 257, 262 based on the

opinion that the defendant was innocent of the crime charged and arbitrarily sen-

Collateral References

False Pretenses 5.

35 C.J.S. False Pretenses §§ 4, 20, 21. 32 Am. Jur. 2d 190, False Pretenses,

Constitutionality of "worthless check" acts. 23 ALR 459 and 76 ALR 1229.

False pretense or confidence game through means of worthless checks or draft. 35 ALR 344 and 174 ALR 173.

Construction and effect of "bad check"

statute with respect to post-dated checks. 29 ALR 2d 1181.

Construction and effect of "bad check" statute with respect to check in payment of pre-existing debt. 59 ALR 2d 1159.

Attempt to commit offenses of larceny

by trick, confidence game, false pretenses and the like. 6 ALR 3d 241.

"Worthless check" statute, reasonable expectation of payment as affecting offense under. 9 ALR 3d 719.

94-2703. (11370) Grand and petit larceny. Larceny is divided into two degrees, the first of which is termed grand larceny, the second petit larcenv.

History: En. Sec. 882, Pen. C. 1895; re-en. Sec. 8644, Rev. C. 1907; re-en. Sec. 11370, R. C. M. 1921. Cal. Pen. C. Sec. 486.

Collateral References

Larcenv@ 23. 52A C.J.S. Larceny § 60 (1) et seq. 32 Am. Jur. 940, Larceny, § 43.

94-2704. (11371) Grand larceny defined. Grand larceny is larceny committed with a felonious intent in either of the following cases:

- When the property taken is of value exceeding fifty dollars.
- When the property taken is from the person of another.
- When the property taken is a stallion, mare, gelding, colt, foal, or filly, cow, steer, bull, stag, heifer, calf, mule, jack, jenny, goat, sheep, or
- 4. If any person or persons shall steal, or with intent to steal shall take, carry, drive, lead, or entice away any mare, gelding, stallion, colt, foal, or filly, mule, jack or jenny, ox, cow, bull, stag, heifer, steer, calf, sheep, goat, or hog, being the property of another, he or they shall be deemed guilty of grand larceny; and shall be liable to the person or persons whose property is stolen for the said property or the value thereof, and for any expenses by him or them incurred in endeavoring to make reclamation thereof.

History: Ap. p. Sec. 883, Pen. C. 1895; en. Sec. 1, p. 247, L. 1897; re-en. Sec. 8645, Rev. C. 1907; amd. Sec. 1, Ch. 57, L. 1921; re-en. Sec. 11371, R. C. M. 1921. Cal. Pen. C. Sec. 487.

Aiding and Abetting

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show defendant's guilt that he aided or abetted in the commission of the crime under section 94-6423 because all persons concerned in the commission of a crime are principals under section 94-204. State v. Maciel, 130 M 569, 305 P 2d 335, 336.

Disposal of Stolen Property

If the crime of larceny has been completed, i. e., the taking and carrying away of the property has come to an end, then anyone subsequently assisting the thieves in the disposal of the stolen property would not be guilty of larceny. State v. Guay, 138 M 362, 357 P 2d 19, 22.

Effect of Ownership Not Proven as Alleged.

Where the information alleges the ownership of the property, such allegation must be proven; proof of a brand only is not sufficient proof of the ownership of an animal bearing such brand. State v. Elmore, 126 M 232, 247 P 2d 488, 492.

Evidence of Horse in Foreign State Admissible

Where defendant was one of several men who had entered into a concerted plan to steal horses and ship them out of the state for sale, evidence as to the presence of animal in state to which shipped, was admissible as a link in the chain, or as part of the res gestae relating to larcenous intent in the transaction. State v. Akers, 106 M 43, 54, 74 P 2d 1138.

Felonious Nature of Crime

Crime denominated by this statute is a felony. Gransberry v. State, 149 M 158, 423 P 2d 853.

Instructions

Under subdivision 2, the taking of property from the person of another constitutes grand larceny irrespective of the amount taken; therefore, an offered instruction that, if money charged to have been taken was less than \$50, defendants could only be found guilty of petit larceny was properly refused. State v. Fisher, 108 M 68, 77, 88 P 2d 53.

In a prosecution for larceny of sheep, in which defendant contended that the animals were taken with the consent of the owner and that he had been illegally entrapped, instructions on questions of consent and entrapment, held sufficient to state the law of the case. State v. Snider, 111 M 310, 312, 111 P 2d 1047.

Instruction that if the jury should find that a cow allegedly stolen was the property of the prosecuting witness, and "if there is no evidence of ownership in any other person" they could conclude that the ownership remained in him, held not open to objection that it assumed that there was no other evidence as to ownership, etc., the court, by the quoted words, having expressly recognized the possibility

of the existence of other evidence. Instructions, taken as a whole, sufficient on the subject. State v. Rossell, 113 M 457, 462, 127 P 2d 379.

Larceny by Bailee

Where defendant charged with grand larceny by bailee did not deny that he received a check from the complaining witness, but his defense was that it was a loan instead of a payment for an automobile, evidence as to whether the check was a loan or payment for the automobile was admissible over objection that it permitted a witness to vary a written instrument by parol testimony. State v. Ahl, 140 M 305, 371 P 2d 7, 9.

Defendant, who admitted title to automobile in the complaining witness and that he accepted and took custody of a check, and agreed that the money was to pay for the automobile, but failed to deliver the automobile, requiring the complaining witness to again pay for it, violated his trust as bailee by appropriating the money to his own use and was guilty of grand larceny by bailee. State v. Ahl, 140 M 305, 371 P 2d 7, 10.

Multi-Count Information

Information in five counts, three of which alleged larceny of more than one cow, did not violate "former jeopardy" provision of constitution since each count states separate offense and since grand larceny statute makes theft of each separate animal a separate and distinct offense and since statute providing for joinder of offenses permits information to charge more than one offense in separate counts. State v. Johnson, 149 M 173, 424 P 2d 728.

Ownership Not Essence of Crime—Different Brands

Though ownership must be shown so that defendant may protect himself against another prosecution for the same offense, it is merely a matter of description and not the essence of the crime; the crime is against the state, not the owner or ownership; where the owner and two others testify to ownership, the presence of two unvented brands besides the recorded brand does not result in failure of proof of ownership, unrecorded brands are descriptive as any other identifying marks. State v. Akers, 106 M 43, 51, 53, 74 P 2d 1138.

Proof of Taking and Asportation

Conviction for larceny cannot be sustained where the evidence connecting the defendant with the hide and asportation of a live steer amounts to no more than suspicion and conjecture. State v. Elmore, 126 M 232, 247 P 2d 488, 492.

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Conviction of defendant of grand larceny of an automobile was reversed where the actual taking and asportation of the car in question was not proven. State v. Fairbanks, 140 M 243, 370 P 2d 497, 499. (Dissenting opinions, 140 M 243, 370 P 2d 497, 500.

Refers to Live Animals

As this section refers to live animals only, defendants, who were charged with stealing certain heifers, the carcasses of which, dressed for beef, were found con-cealed on the range, could be convicted only upon evidence showing beyond a reasonable doubt that they killed, or took part in killing, the animals. State v. Keeland, 39 M 506, 512, 104 P 513.

Sufficiency of Charge

An information, alleging that accused did take, steal, drive, lead, and entice away one steer, the property of a person named, with a felonious intent on the part of the accused to deprive the true owner thereof, and to steal the same, charges "grand larceny," as defined by subdivision 4 of this section. State v. Biggs, 45 M 400, 402, 123 P 410.

An information charging that defendant stole a "horse" is a sufficient charge of grand larceny under this section. State v. Collins, 53 M 213, 163 P 102.

Transporting of Stolen Property

Where one joins with another in committing the crime of larceny and assists in the transporting and disposition of property which he knows to be stolen, he may be convicted of larceny. This is true even though the one assisting in the transporting and disposing of the stolen property was not in any manner connected with the initial taking of the property. State v. Guay, 138 M 362, 357 P 2d 19, 22.

Value of Animal Stolen Immaterial

Under this section, the value of a cow alleged to have been stolen is not a matter in issue; therefore refusal to permit a witness to be cross-examined as to the value of the animal was not an abuse of discretion. State v. McClain, 76 M 351, 357, 246 P 956.

Under this section, the stealing of a calf is made grand larceny, regardless of its value, and therefore the jury in such a case are not required to make a finding in their verdict as to the value of the animal stolen. State v. Ingersoll, 88 M 126, 131, 292 P 250.

Value of Several Articles May Be Aggregated To Charge Grand Larceny

Where the larceny is of several different articles, taken in substantially the same transaction, their value may be aggregated, in order to make out a charge of grand larceny. In re Jones, 46 M 122, 125, 126 P 929.

Value, When Material

The other elements of the crime of larceny being proven, if the property stolen is shown beyond a reasonable doubt to be of value, the amount of the value is material only in determining the degree of which defendant is guilty; and where there was testimony that stolen articles were of substantial value, the evidence was sufficient to sustain a verdict of guilty of petit larceny-the taking of a thing of the value of fifty dollars or less. State v. Dimond, 82 M 110, 114, 265 P 5.

It is grand larceny to take money from the person of another with a felonious intent no matter what the amount is that is taken. State v. Peschon, 131 M 330, 310 P 2d 591, 595.

Collateral References

Larceny \$\infty 23. 52A C.J.S. Larceny § 60 (1). 32 Am. Jur. 886, Larceny, §§ 3, 4.

Married woman's criminal responsibility for stealing from husband. 4 ALR 282 and 71 ALR 1116.

Intent to convert property to one's own use or to the use of third person as element of larceny. 12 ALR 804.

Larceny as affected by purpose to take or retain property in payment of or as security for, a claim. 13 ALR 142; 116 ALR 997 and 46 ALR 2d 1227.

Larceny by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended. 14 ALR 894.

Purchase of property on credit without intending to pay for it as larceny. 35 ALR 1326 and 36 ALR 1122.

Larceny by finder of property. 36 ALR 372.

Criterion of value for purpose of fixing degree of larceny of automobile license plates. 48 ALR 1167.

Larceny by one spouse of other's prop-

erty. 55 ALR 558.

Unauthorized use of another property by one lawfully in possession thereof as larceny. 62 ALR 354.

Acceptance of defendant's note or other contractual obligation as affecting charge of larceny. 70 ALR 208.

Appropriation or removal without payment of property delivered in expectation of cash payment. 83 ALR 441. Larceny of real property or things sa-

voring of real property. 131 ALR 146.

Single or separate larceny predicated upon a series of acts over a period of time. 136 ALR 948.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Embezzlement and larceny distinguished.

146 ALR 532.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for larceny or receiving stolen property. 147 ALR 1058.

property. 147 ALR 1058.
Charge of larceny or receiving stolen goods predicated upon taking or appro-

priation of waste paper or other articles deposited in street with intention to donate to patriotic or other cause. 156 ALR 631.

Person who steals property in one state or country and brings it into another as subject to prosecution for larceny in latter. 156 ALR 862.

Fixed or controlled price as affecting value of goods for purpose of determining degree of larceny. 157 ALR 1303.

94-2704.1. Possession of stolen livestock as evidence of larceny. The possession, claim of ownership or control over recently stolen livestock shall be deemed prima facie evidence of guilt of larceny of that livestock unless this presumption is rebutted or contradicted by other credible evidence.

History: En. Sec. 1, Ch. 202, L. 1965.

94-2705. (11372) **Petit larceny defined.** Larceny in other cases is petit larceny.

History: En. Sec. 884, Pen. C. 1895; re-en. Sec. 8646, Rev. C. 1907; re-en. Sec. 11372, R. C. M. 1921. Cal Pen. C. Sec. 488.

NOTE.—See annotations under Sec. 94-2704.

Operation and Effect

Where there are two or more distinct larcenies, the general rule is that they cannot be aggregated so as to make the value of the property stolen sufficient to constitute grand larceny, where the value of the property taken at any one time was not sufficient for that purpose. But there is an exception to this rule, that though the larceny is of several different articles, if

they are taken in substantially the same transaction, their value may be aggregated, in order to make out a charge of grand larceny. In re Jones, 46 M 122, 125, 126 P 929.

The other elements of the crime of larceny being proven, if the property stolen is shown beyond a reasonable doubt to be of value, the amount of the value is material only in determining the degree of which defendant is guilty; and where there was testimony that stolen articles were of substantial value, the evidence was sufficient to sustain a verdict of guilty of petit larceny—the taking of a thing of the value of fifty dollars or less. State v. Dimond, 82 M 110, 114, 265 P 5.

94-2706. (11373) Punishment of grand larceny. Grand larceny is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 885, Pen. C. 1895; re-en. Sec. 8647, Rev. C. 1907; re-en. Sec. 11373, R. C. M. 1921. Cal. Pen. C. Sec. 489.

Degree of Punishment Depends Upon Degree of Crime

Grand larceny and petit larceny are but two separate degrees of the crime of larceny; there is no punishment prescribed for larceny as such, but the degree of punishment is made to depend upon the degree of the crime. State v. Wiley, 53 M 383, 386, 164 P 84.

Plea of Guilty

Defendant's plea of "guilty" to information charging him with grand larceny rendered him subject to a sentence of "not less than one nor more than fourteen years" imprisonment, depending upon the

view taken by the trial judge of the evidence to be presented to him, in open court, showing circumstances either in aggravation or mitigation of punishment. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 351.

Extent of punishment on plea of guilty to grand larceny should have been determined by exercise of sound discretion on part of the trial judge after circumstances had been "presented by the testimony of witnesses examined in open court" specifically provided for in sections 94-7813 and 94-7814 (since repealed). Kuhl v. District Court, 139 M 536, 366 P 2d 347, 351.

Reduction of Sentence

Four-year sentence of defendant who pleaded guilty to grand larceny was re-

duced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations as provided in sec-

tions 94-7813 and 94-7814 (since repealed). Kuhl v. District Court, 139 M 536, 366 P 2d 347, 365.

Collateral References Larceny \$28. 52A C.J.S. Larceny § 158.

94-2707. (11374) Punishment of petit larceny. Petit larceny is punishable by fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 886, Pen. C. 1895; re-en. Sec. 8648, Rev. C. 1907; re-en. Sec. 11374, R. C. M. 1921. Cal. Pen. C. Sec. 490.

94-2708. (11375) Dogs, property. Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property.

History: En. Sec. 887, Pen. C. 1895; re-en. Sec. 8649, Rev. C. 1907; re-en. Sec. 11375, R. C. M. 1921. Cal. Pen. C. Sec. 491.

Collateral References Larceny 5, 6.

52A C.J.S. Larceny §§ 60 (2), 62. 32 Am. Jur. 992, Larceny, § 79.

Dogs as subject of larceny. 92 ALR 212. Cats as subject of larceny. 73 ALR 2d 1039.

94-2709. (11376) Larceny of lost property. One who finds lost property under circumstances which give him knowledge of or means of inquiry as to the real owner and who appropriates such property to his own use or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.

History: En. Sec. 888, Pen. C. 1895; re-en. Sec. 8650, Rev. C. 1907; re-en. Sec. 11376, R. C. M. 1921. Cal. Pen. C. Sec. 485.

Collateral References Larceny \$\infty\$10.

52A C.J.S. Larceny § 49. 32 Am. Jur. 986, Larceny, § 76.

Larceny by finder of property. $36~\mathrm{ALR}$ 372.

94-2710. (11377) Larceny of written instruments. If the thing stolen consists of any evidence of debt or other written instrument the amount of money due thereon or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property, the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen.

History: En. Sec. 889, Pen. C. 1895; re-en. Sec. 8651, Rev. C. 1907; re-en. Sec. 11377, R. C. M. 1921. Cal. Pen. C. Sec. 492.

Value of Promissory Notes

An instruction in a prosecution for the larceny of promissory notes that the amount of money due on the notes or secured to be paid thereby and remaining unsatisfied was their value, was correct under this section, and one offered by defendant to the effect that evidence relating to the instrument should be disre-

garded because it has not been shown that they had any value was properly refused, where one of the notes was introduced in evidence and the value of the other was shown by books of account, thus making out a prima facie case for the state. State v. Cassill, 71 M 274, 279, 229 P 716.

Collateral References

Larceny \$ 60 (2). 52A C.J.S. Larceny § 60 (2). 32 Am. Jur. 987, Larceny, § 77. 94-2711. (11378) Value of passage tickets. If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad or vessel, or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper, or writing.

History: En. Sec. 890, Pen. C. 1895; re-en. Sec. 8652, Rev. C. 1907; re-en. Sec. 11378, R. C. M. 1921. Cal. Pen. C. Sec. 493.

Collateral References Larceny © == 6. 52A C.J.S. Larceny § 60 (2). 32 Am. Jur. 987, Larceny, § 77.

94-2712. (11379) Written instruments completed but not delivered. All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner.

History: En. Sec. 891, Pen. C. 1895; re-en. Sec. 8653, Rec. C. 1907; re-en. Sec. 11379, R. C. M. 1921. Cal. Pen. C. Sec. 494.

Collateral References Larceny∞5. 52A C.J.S. Larceny § 3 (4). 32 Am. Jur. 987, Larceny, § 77.

94-2713. (11380) Severing and removing part of the realty. The provisions of this chapter apply where the thing taken is a fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time.

History: En. Sec. 892, Pen. C. 1895; re-en. Sec. 8654, Rev. C. 1907; re-en. Sec. 11380, R. C. M. 1921. Cal. Pen. C. Sec. 495.

52A C.J.S. Larceny § 3 (3). 32 Am. Jur. 999-1002, Larceny, §§ 83, 84.

Collateral References Larceny \$\infty\$5.

Larceny of real property or things savoring of real property. 131 ALR 146.

94-2714. (11381) Larceny and receiving stolen property out of the state. Every person who, in another state or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this state.

History: En. Sec. 893, Pen. C. 1895; re-en. Sec. 8655, Rev. C. 1907; re-en. Sec. 11381, R. C. M. 1921. Cal. Pen. C. Sec. 497.

Sufficiency of Charge

In a prosecution under this section, the information need not allege when and where the taking actually occurred, such matters being evidentiary and open to proof without specific allegation; the charge is sufficient if it be the same in form as for a larceny committed in this state. State v. Willette, 46 M 326, 328, 127 P 1013, overruled on other grounds in State v. Greeno, 135 M 580, 592, 342 P 2d 1052.

Collateral References

Criminal Law 97 (1); Larceny 22.

22 C.J.S. Criminal Law § 134; 52A C.J.S. Larceny § 69.

32 Am. Jur. 1012, Larceny, § 98; generally, 45 Am. Jur. 383, Receiving Stolen Property.

Wife's criminal responsibility for receiving stolen goods from husband. 4 ALR 281 and 71 ALR 1116.

Entrapment to commit crime of receiving stolen property. 18 ALR 187; 66 ALR 478 and 86 ALR 263.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for receiving stolen property. 147 ALR 1058.

94-2715. (11382) Conversion by fiduciary, larceny. Every person acting as executor, administrator, guardian, receiver, the officer of any bank or corporation, or trustee of any description appointed by a deed, will, or other instrument, or by an order or judgment of a court, judge, or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or property, or other valuable thing, or any proceeds thereof, in his possession or custody, by virtue of his office, employment, or appointment, is guilty of larceny in such degree as is herein prescribed with reference to the value of such property.

History: En. Sec. 894, Pen. C. 1895; re-en. Sec. 8656, Rev. C. 1907; re-en. Sec. 11382, R. C. M. 1921.

Operation and Effect

Where a guardian, who had given ample security to account for all funds coming into his hands as such, and who was personally able to raise the amount thereof on demand, under a misapprehension that he had a right to do so, temporarily employed guardianship funds to repay a loan, thus technically appropriating them to his own use, he nevertheless could not be adjudged guilty of larceny under this section, especially where, at the settlement of the estate, he fully accounted for all moneys paid over to him as guardian. Smith v. Smith, 45 M 535, 580, 125 P 987.

An information charging that, while activate acception of a large product of the state.

An information charging that, while acting as cashier of a bank, defendant feloniously converted a liberty bond to his own use, was insufficient for failure to allege that the bond came into his possession by

virtue of his office. State v. Wallin, 60

M 332, 339, 199 P 285.

Defendant, a bank officer, whose personal account with the bank was overdrawn, drew a draft on another bank and credited his account with the amount thereof; the draft was returned unpaid and he then charged it to the account of one of the bank's depositors. No actual money was taken and the cash account of the bank was not diminished. Held, that while defendant may have been guilty of falsifying the books of the bank or misapplication of a credit belonging to another his act did not constitute larceny from the bank as charged in the information. State v. Rarey, 72 M 270, 275, 233 P 615.

Collateral References

Larceny \$30 et seq. 32 Am. Jur., Larceny, p. 920, §31; p. 969, §62.

94-2716. (11383) Verbal false pretense, not larceny. A purchase of property by means of false pretense is not criminal where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged.

History: En. Sec. 895, Pen. C. 1895; re-en. Sec. 8657, Rev. C. 1907; re-en. Sec. 11383, R. C. M. 1921.

Cross-Reference

Obtaining money by false pretenses as larceny, sec. 94-1805.

Collateral References

False Pretenses 7 (5). 35 C.J.S. False Pretenses §§ 4, 9, 10, 14. 32 Am. Jur. 2d 193, Larceny, § 27.

94.2717. (11384) Claim of title, restoration of property as defense. Upon an indictment, information or complaint for larceny it is a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable. The fact that the defendant intended to restore the property taken is no ground of defense if it has not been restored before complaint, to a magistrate or court, charging the commission of the offense, has been made.

History: En. Sec. 896, Pen. C. 1895; re-en. Sec. 8658, Rev. C. 1907; re-en. Sec. 11384, R. C. M. 1921.

Evidence of Intent

Where a selling agent is charged with larceny and sets up the defense of appropriating a customer's check under claim of right as a commission, testimony of clergyman concerning conversation had between himself and accused as to prior statements made by owner to agent, is inadmissible as hearsay since it is a self-serving declaration. State v. Fairburn, 135 M 449, 340 P 2d 157.

Jury Question

Though in a prosecution for larceny, appropriation by defendant of the property in question openly and under a claim of

title preferred in good faith is, under this section, a sufficient defense, it lies within the jury's province to say whether or not he established the defense by his evidence. State v. Letterman, 88 M 244, 255, 292 P 717.

Collateral References

Larceny ← 3 (3), 26. 52A C.J.S. Larceny §§ 71, 72. 32 Am. Jur. 1029, Larceny, §§ 116, 117.

94-2718. (11385) Larceny of gas or electricity. Every person who, with intent to injure or defraud, procures, makes, or causes to be made, any pipe, tube, wire, or other conductor of gas or electricity, and connects the same, or causes it to be connected, with any main, service pipe, or other pipe for conducting or supplying illuminating gas or any wires or other conductor of electricity, in such manner as to supply illuminating gas or electricity to any lamp, motor, burner, or orifice, by or at which illuminating gas or electricity is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas or electric meter, or obstructs its action, is guilty of a misdemeanor. In prosecutions for offenses under this section, proof that any of the acts herein forbidden have been done in, upon, or about the premises owned or used by the defendant charged with the commission of such offense in such a manner as to decrease or lessen the amount he should pay under his understanding or contract with any person or corporation engaged in the business of furnishing and selling gas or electricity, shall be prima facie evidence of the guilt of said defendant.

History: Ap. p. Sec. 897, Pen. C. 1895; en. Sec. 1, p. 248, L. 1897; re-en. Sec. 8659, Rev. C. 1907; re-en. Sec. 11385, R. C. M. 1921. Cal. Pen. C. Secs. 498 and 499a.

Collateral References

Electricity 21; Gas 23; Larceny 5.
29 C.J.S. Electricity 77; 38 C.J.S. Gas
5; 52A C.J.S. Larceny 3 (1).
32 Am. Jur. 1003, Larceny, § 86, 87.

Successive takings of electrical energy, gas, water, heat, power, etc., as a single offense. 113 ALR 1286.

94-2719. (11386) Larceny of water, gas and electricity. Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, wire, electrical conductor or other instrument with any main, service pipe, or other pipe or conduit or flume for conducting water, or with any main, service pipe, or other pipe or conduit for conducting gas, or with any main service wires or other electrical conductor used for the purpose of conducting electricity for light or motive service, for the purpose of taking therefrom water, gas, or electricity without the knowledge of the owner thereof and with intent to evade payment therefor, is guilty of a misdemeanor. In prosecutions for offenses under this section proof that any of the acts herein forbidden have been done in, upon, or about the premises owned or used by the defendant charged with the commission of such offense in such a manner as to provide for such defendant's use, water, gas or electricity shall be prima facie evidence of the guilt of the defendant.

LARCENY

History: Ap. p. Sec. 898, Pen. C. 1895; en. Sec. 2, p. 248, L. 1897; re-en. Sec. 8660, Rev. C. 1907; re-en. Sec. 11386, R. C. M. 1921. Cal. Pen. C. Sec. 499.

Collateral References

Electricity = 21; Gas = 23; Larceny = 5; Waters and Water Courses = 212.

94-2721

29 C.J.S. Electricity § 77; 38 C.J.S. Gas § 5; 52A C.J.S. Larceny § 3 (1); 94 C.J.S. Waters § 313.

32 Am. Jur. 1002, 1003, Larceny, §§ 85-87.

94-2720. (11387) False device for measuring gas, water or electricity. Every person or persons, or officer or officers, or employee or employees of any corporation or corporations who with intent to injure, or defraud, uses or causes to be used any false registering or false measuring device or meter for the measuring of any water, gas or electric current that is sold to any other person or persons, corporation or corporations, or who shall alter or change the record or measurement of any such meter or measuring device with intent to injure or defraud, shall be guilty of a misdemeanor and on conviction thereof shall be fined in the sum of not less than one hundred dollars nor more than five hundred dollars. In prosecutions for offenses under this section, proof of the use of such false registering meter or proof of an attempt to collect payment from any consumer for any falsified amount or quantity of gas, water, or electricity, shall be prima facie evidence of the guilt of such defendant.

History: En. Sec. 900, p. 249, L. 1897; re-en. Sec. 8661, Rev. C. 1907; re-en. Sec. 11387, R. C. M. 1921.

94-2721. (11388) Receiver of stolen property. Every person who for his own gain or to prevent the owner from again possessing his own property buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five (5) years or in a county jail not exceeding six (6) months; and it is presumptive evidence that such property was stolen if the same consists of jewelry, silver or plated ware or articles of personal ornaments, brass, bronze or copper fixtures, fittings or parts of machinery, or electrical supplies, or what is commonly termed junk, if purchased or received from a person under the age of twenty-one (21) years unless said property is sold by said minor at a fixed place of business carried on by said minor or his employer.

The jurisdiction of a criminal action for receiving stolen property is in any county wherein said property was received or into or through which such stolen property has been brought.

History: En. Sec. 899, Pen. C. 1895; re-en. Sec. 8662, Rev. C. 1907; amd. Sec. 1, Ch. 137, L. 1915; re-en. Sec. 11388, R. C. M. 1921; amd. Sec. 1, Ch. 30, L. 1931. Cal. Pen. C. Sec. 496.

Confusing Prior Knowledge with Aiding or Abetting

The mere knowledge in a person that a crime is about to be committed does not constitute him an accomplice; nor does the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the particular theft nor even to give him the knowledge that it was to be committed. State v. Mercer, 114 M 142, 149, 133 P 2d 358.

Effect of Statutory Presumption When Receiving Property from Minor

Under the provision of this section declaring that where a person buys or receives any of the articles specifically enumerated therein from a minor other than at a fixed place of business carried on by the minor or his employer, it shall be presumptive evidence that the property was stolen, it is also to be presumed that the person bought or received it knowing it to be stolen, the rule applying to him at the time of its purchase or reception as well as upon his trial. State v. Sim, 92 M 541, 547, 16 P 2d 411.

In a prosecution against the owner of a garage for buying radiator cores, coils of copper tubing, etc., from a minor at his, defendant's, place of business, which articles had been stolen by the boy from his father's automobile repair shop, held, that in the absence of evidence on defendant's part to overcome the presumption adverted to in the preceding paragraph, the jury was justified in finding that defendant, bound, as he was, to know the law as declared by this section, knew when he purchased the articles that they were stolen. State v. Sim, 92 M 541, 547, 16 P 2d 411.

Essential Elements of Crime

To make out the offense covered by this section, the evidence must establish that the property in question was stolen; that the defendant bought it or received it knowing it to have been stolen; and that he did so for his own gain, or to prevent the owner from regaining possession of it. State v. Moxley, 41 M 402, 407, 110 P 83.

State v. Moxley, 41 M 402, 407, 110 P 83. To make out the offense of buying or receiving stolen property under this section, the state's evidence must establish that the property was stolen, that the defendant bought or received it knowing it was stolen, and that he did so for his own gain or to prevent the owner from regaining possession of it. State v. Sim, 92 M 541, 547, 16 P 2d 411.

In a prosecution for receiving stolen property, a distinct statutory offense, guilty knowledge on the part of the defendant that the property was stolen when he received it, which involves guilty intent, is essential to the constitution of the crime. State v. Keays, 97 M 404, 407, 34 P 2d 855.

Proof that the defendant knew the property was stolen is an essential element of the crime. The evidence is not sufficient where the state relies on a bill of sale which describes "3 cow hides red no brand" and in fact the hides had brands and cattle was missing from the brand owners, while the defendant proves that when he received the hides they were bundled up and so stiffly frozen that they could not be examined to see if they had brands. State v. Gilbert, 126 M 171, 246 P 2d 814, 815.

May Be Proved by Circumstantial Evidence

The crime of receiving stolen property, knowing it to have been stolen, may be proved by circumstantial evidence. State v. Moxley, 41 M 402, 408, 110 P 83.

Ownership Is a Matter of Description

The allegation of ownership in an information charging receiving stolen property, is merely one of description, this section not defining its character, whether general, special, joint or several, and where it was fully proved as being in a partnership in a named city, and there was no suggestion of any danger of defendant's being subjected to another prosecution as that of a different owner, contention that there was failure of proof in that regard is without merit. State v. Mercer, 114 M 142, 156, 133 P 2d 358.

Ownership Must Be Proven as Alleged

In a prosecution for the crime of receiving stolen property, its ownership must be proved as alleged; hence, where the ownership, as laid in the information, was jointly in three persons named, and the evidence disclosed that most of the articles belonged to one of them, and the remaining ones to the other two individually, there was such a variance as amounted to a failure of proof. State v. Moxley, 41 M 402, 408, 110 P 83.

Conviction for receiving stolen goods cannot be sustained where the information charged that the defendant received a deepfreeze knowing the same to have been stolen from the true owner, Missoula County, while the facts were that the defendant was the county surveyor and had ordered a deepfreeze and charged it to the county. Since the acts of the surveyor were unlawful, the county never purchased the freezer and never had it in its possession and at no time had title to the deepfreeze; therefore, Missoula County was never the owner from whom it was stolen as charged in the information. State v. Bourdeau, 126 M 266, 246 P 2d 1037, 1038.

Receiver Not an Accomplice

One who receives stolen property, as did the herder referred to in this case, but not for his own gain or to prevent the owner from regaining possession of it, is not a receiver of stolen property, nor does the fact that one is a receiver of stolen property make him an accomplice of the one committing the larceny. State v. McComas, 85 M 428, 434, 278 P 993.

Receiving of Stolen Property and Larceny Separate Crimes

While one who steals property is not an accomplice of one who receives it knowing

it to have been stolen, the two offenses constituting distinct crimes, where the thief and the receiver conspire together in advance of the larceny for one to steal and the other to receive, they are principals, and each is an accomplice of the other. State v. Keithley, 83 M 177, 180, 182, 271 P 449.

The crime of receiving stolen property defined in this section is a distinct statutory crime, and one who, after the crime of larceny is completed, being present, aids and abets others in receiving the stolen property, with knowledge that it was stolen and with the intent, either for his own gain or to prevent the owner from again possessing the property, is a principal and properly prosecuted as such. State v. Huffman, 89 M 194, 201, 296 P 789.

Held, that the conspiracy rule promulgated in State v. Keithley, 83 M 177, 271 P 449, being an exception to the rule generally accepted that he who commits a theft is not the accomplice of him who knowingly receives the stolen property, though correct under the facts of that case, does not make the thief an accomplice of the receiver where the theft was committed before the thief solicited the received to buy the property, the latter having had no knowledge of the fact that the theft was to be committed. State v. Mercer, 114 M 142, 149, 133 P 2d 358.

Receiving Stolen Property of the U.S. Is a Crime against the State

Under an information charging the crime of receiving stolen property belonging to the United States, held, on application for writ of habeas corpus based upon the contention that since the property belonged to the federal government, it had exclusive jurisdiction of the offense, that the fact that the offense is also indictable under section 101, Title 18, U. S. C., does not oust the state district court of jurisdiction to try defendant under this section, which makes it a crime against the state to receive stolen property regardless of ownership. Ex parte Groom, 87 M 377, 379, 287 P 638.

Sufficiency of Information

As in charging the offense of larceny, so in charging that of receiving stolen property, the information must identify the offense by a description of the things stolen, and state the name of the owner, if known. State v. Moxley, 41 M 402, 408, 110 P 83.

It is not necessary to allege ownership, or that ownership is unknown, where the information otherwise describes the stolen goods with sufficient accuracy to apprise the defendant to prepare his defense and to protect him from double jeopardy. State v. Peters, 146 M 188, 405 P 2d 642.

Value Immaterial

In an information under this section, value need not be alleged, and proof of some value is enough. The penalty does not depend upon value. State v. Moxley, 41 M 402, 409, 110 P 83.

When Defendant Also Principal in Theft

Although, under the facts stated, defendant who apparently advised and encouraged the theft of a calf, under section 94-204 was an accomplice or accessory before the fact (and therefore a principal to the actual theft under section 94-6423, abrogating the distinction) and by legal fiction had constructive possession, but since he later obtained physical possession from the taker, the state may elect to prosecute him for receiving stolen property, and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. State v. Webber, 112 M 284, 301, 116 P 2d 679.

Collateral References

Receiving Stolen Goods =1.

76 C.J.S. Receiving Stolen Goods § 1

See generally, 45 Am. Jur. 383, Receiving Stolen Property.

Wife's criminal responsibility for receiving stolen goods from husband. 4 ALR 281 and 71 ALR 1116.

Entrapment to commit crime of receiving stolen property. 18 ALR 187; 66 ALR 478 and 86 ALR 263.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for receiving stolen property. 147 ALR 1058.

94-2722. (10873) Larceny, destruction, etc., of records by officers. Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering, or falsifying, removing, or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 230, Pen. C. 1895; re-en. Sec. 8229, Rev. C. 1907; re-en. Sec. 10873, R. C. M. 1921, Cal. Pen. C. Sec. 113.

Does Not Refer to Indexing

This section refers to mutilating, defacing, or altering books, maps, and other documents which are matters of evidence, and has no reference to the making of a correct index of the contents of any books in a public office. State ex rel. Coad v. District Court, 23 M 171, 175, 57 P 1095.

Intent To Injure Unnecessary

An indictment under this section, for willfully secreting a public record, need not allege an intent to injure any particular person, in view of section 10713, R. C. M. 1935 (since repealed) providing that an act may be done "willfully" without any intent to injure another, nor is it

necessary that it allege the means used to secrete the record. State of Montana v. Bloor, 20 M 574, 583, 52 P 611.

Secreting a Public Record

Where a bill was placed in the hands of the secretary of the senate after its passage in that body, to be transmitted by him in his official capacity to the house, and he willfully withheld it, he was guilty of secreting a public record, though he was not the officer required by law to take charge of bills. State of Montana v. Bloor, 20 M 574, 583, 52 P 611.

Collateral References

Larceny 5; Records 21, 22.
52A C.J.S. Larceny § 3 (4); 76 C.J.S.
Records § 72 et seq.
32 Am. Jur. 990, Larceny, § 77.

94-2723. (10874) Larceny, destruction, etc., of records by others. Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or both.

History: En. Sec. 231, Pen. C. 1895; re-en. Sec. 8230, Rev. C. 1907; re-en. Sec. 10874, R. C. M. 1921. Cal. Pen. C. Sec. 114.

94-2724. (10875) Offering forged or false instruments to be recorded. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within the state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of felony.

History: En. Sec. 232, Pen. C. 1895; re-en. Sec. 8231, Rev. C. 1907; re-en. Sec. 10875, R. C. M. 1921. Cal. Pen. C. Sec. 115.

Collateral References

Forgery \$37. 37 C.J.S. Forgery \$37. 36 Am. Jur. 2d 697, Forgery, \$28.

94-2725. (10876) Adding names, etc., to the jury lists. Every person who adds any names to the list of persons selected to serve as jurors for the county, either by placing the same in the jury box or boxes, or otherwise, or extracts any name therefrom, or destroys the jury box or boxes, or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony.

History: En. Sec. 233, Pen. C. 1895; re-en. Sec. 8232, Rev. C. 1907; re-en. Sec. 10876, R. C. M. 1921. Cal. Pen. C. Sec. 116.

Collateral References
Obstructing Justice 56.

67 C.J.S. Obstructing Justice § 7.

Misconduct of officers in selection of jurors as contempt. 7 ALR 345. Irregularities in drawing names for panel. 92 ALR 1109. LIBEL 94-2801

94-2726. (10877) Falsifying jury lists, etc. Every officer or person required by law to certify to the list of persons selected as jurors, who maliciously, corruptly, or willfully certifies to a false and incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury box or boxes, the same names that are on the certified list, and no more and no less than are on such lists, is guilty of a felony.

History: En. Sec. 234, Pen. C. 1895; re-en. Sec. 8233, Rev. C. 1907; re-en. Sec. 10877, R. C. M. 1921. Cal. Pen. C. Sec. 117.

CHAPTER 28

LIBEL

Section 94-2801. Libel defined.

94-2802. Punishment of libel.

94-2803. Malice presumed.

94-2804. Truth may be given in evidence—jury to determine law and fact.

94-2805. Publication defined.

94-2806. Liability of editors and publishers.

94-2807. Publishing a true report of public proceedings privileged.

94-2808. Extent of privilege.

94-2809. Other privileged communications.

94-2810. Threatening to publish libel—offer to prevent publication, with intent to extort money.

94-2811. Giving false information for publication.

94-2801. (10989) Libel defined. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or to publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.

History: En. Sec. 125, p. 207, Bannack Stat.; re-en. Sec. 139, p. 301, Cod. Stat. 1871; re-en. Sec. 139, 4th Div. Rev. Stat. 1879; re-en. Sec. 154, 4th Div. Comp. Stat. 1887; re-en. Sec. 430, Pen. C. 1895; re-en. Sec. 8325, Rev. C. 1907; re-en. Sec. 10989, R. C. M. 1921. Cal. Pen. C. Sec. 248.

Cross-References

Indictment, sec. 94-6417.

Political criminal libel defined, sec. 94-

False Report on Dissenting Opinion of Jurist

Contemptuous language published by a newspaper concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but if the language be libelous, the remedy is a civil or criminal action for libel. In re Nelson, 103 M 43, 64, 60 P 2d 365.

Whether Libelous Per Se

In determining whether a publication is libelous per se, the language complained of must be construed in its relation to the entire article in which it appears; so construed, held that the statement published in a newspaper that the publisher would "continue to expose all graft and corruption," taken in connection with preceding assertions that an attachment proceeding had been brought against the paper in revenge for exposing the "dirty work" of plaintiff, a constable, and another, that plaintiff had acted unlawfully in other cases, and that he had formed a collusive partnership with such other person, in effect charged plaintiff with graft in connection with the administration of his office and was, therefore, libelous per se. State v. Winterrowd, 77 M 74, 77, 249 P 664.

Whether Word "Graft" Libelous

The word "graft," when used in connection with the conduct of a public offi-

cer, implies sometimes actual theft and always want of integrity, and its use in that respect is actionable per se. State v. Winterrowd, 77 M 74, 77, 249 P 664.

Collateral References

Libel and Slander 1, 3.

53 C.J.S. Libel and Slander §§ 1, 2. 33 Am. Jur. 291, Libel and Slander, §§ 308 et seq.

Entrapment to commit crime of criminal libel, 18 ALR 160; 66 ALR 478 and 86 ALR 263.

Character of libel for which criminal prosecution will lie. 19 ALR 1470.

Criminal responsibility for libel of officer. 19 ALR 1489.

"Infamous offense," libel as, within constitutional or statutory provision in

relation to presentment or indictment by grand jury. 24 ALR 1013.

Recall petition, libel by. 43 ALR 1268. Words as criminal offense other than libel or slander. 48 ALR 83.

Libel and slander: privilege as regards publication of judicial opinion, 146 ALR 913.

Labor relations or disputes, statements regarding. 150 ALR 952 and 19 ALR 2d 694.

Joint criminal liability for slander. 26 ALR 2d 1032.

Statements imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public officer or employee. 53 ALR 2d 8.

ALR 2d 8. "Crook," libel and slander, charge of being. 1 ALR 3d 844.

94-2802. (10990) Punishment of libel. Every person who willfully, and with a malicious intent to injure another, publishes, or procures to be published, any libel, is punishable by fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding one year.

History: En. Sec. 431, Pen. C. 1895; re-en. Sec. 8326, Rev. C. 1907; re-en. Sec. 10990, R. C. M. 1921. Cal. Pen. C. Sec. 249.

Collateral References

Libel and Slander 162.
53 C.J.S. Libel and Slander § 302.
33 Am. Jur. 310, Libel and Slander, § 342.

94-2803. (10991) Malice presumed. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

History: En. Sec. 432, Pen. C. 1895; re-en. Sec. 8327, Rev. C. 1907; re-en. Sec. 10991, R. C. M. 1921. Cal. Pen. C. Sec. 250.

Presumption of Malice

Where a publication by a newspaper is libelous per se, the law presumes malice, in the absence of lawful excuse, even though no spite or ill-will be shown. Kelly

v. Independent Publishing Co., 45 M 127, 141, 122 P 735. See also Cooper v. Romney, 49 M 119, 127, 141 P 289.

Collateral References

Libel and Slander 53 C.J.S. Libel and Slander § 300. 33 Am. Jur. 304, Libel and Slander, § 332.

94-2804. (10992) Truth may be given in evidence—Jury to determine law and fact. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact.

History: En. Sec. 433, Pen. C. 1895; re-en. Sec. 8328, Rev. C. 1907; re-en. Sec. 10992, R. C. M. 1921. Cal. Pen. C. Sec. 251.

Collateral References

94-2805. (10993) Publication defined. To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel, under circumstances which exposed it to be read or seen by any other person than himself.

History: En. Sec. 434, Pen. C. 1895; re-en. Sec. 8329, Rev. C. 1907; re-en. Sec. 10993, R. C. M. 1921. Cal. Pen. C. Sec. 252.

Collateral References

Libel and Slander © □ 146. 53 C.J.S. Libel and Slander § 284. 33 Am. Jur. 293, Libel and Slander, § 311.

94-2806. (10994) Liability of editors and publishers. Each author, editor, or proprietor of any book, newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial.

History: En. Sec. 435, Pen. C. 1895; re-en. Sec. 8330, Rev. C. 1907; re-en. Sec. 10994, R. C. M. 1921. Cal. Pen. C. Sec. 253.

Collateral References

Libel and Slander \$= 150. 53 C.J.S. Libel and Slander § 292. 33 Am. Jur. 295, Libel and Slander, § 315.

Cross-Reference

Liability of radio station operators, secs. 64-205 to 64-207.

94-2807. (10995) Publishing a true report of public proceedings privileged. No reporter, editor, or proprietor of any newspaper, nor any owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, nor any agent or employee of any such owner, licensee, or operator, is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which is not implied from the mere fact of publication or broadcast.

History: En. Sec. 436, Pen. C. 1895; re-en. Sec. 8331, Rev. C. 1907; re-en. Sec. 10995, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1951. Cal. Pen. C. Sec. 254.

Collateral References

Libelous or privileged character of publication by newspaper based on matters

received from news agency or regular correspondent. 86 ALR 475.

Privilege as to reports of judicial proceedings as attaching to publication of meetings, etc., before hearings. 104 ALR 1124.

Garbled, inaccurate, or mistaken report of judicial proceedings as within privilege. 120 ALR 1236.

Libel and slander: privilege in connection with proceedings to disbar or discipline attorney. 77 ALR 2d 493.

94-2808. (10996) Extent of privilege. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected.

History: En. Sec. 437, Pen. C. 1895; re-en. Sec. 8332, Rev. C. 1907; re-en. Sec. 10996, R. C. M. 1921. Cal. Pen. C. Sec. 255.

94-2809. (10997) Other privileged communications. A communication made to a person interested in the communication, by any one who was also interested, or who stood in such relation to the former, as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

History: En. Sec. 438, Pen. C. 1895; re-en. Sec. 8333, Rev. C. 1907; re-en. Sec, 10997, R. C. M. 1921. Cal. Pen. C. Sec. 256.

Collateral References

Libel and Slander \$\infty 148.
53 C.J.S. Libel and Slander \ 288.
33 Am. Jur. 297, Libel and Slander, \ \ 317, 318.

Privilege of statement or communication by official charged with prosecution or detection of crime. 15 ALR 249.

Privilege of communications made to employee regarding conduct of another employee or former employee. 98 ALR

Doctrine of privilege of fair comment as applicable to misstatements of fact in publication relating to public officer or candidate for office, 110 ALR 412 and 150 ALR 358.

Privilege of communications made by private person or concern to public authorities regarding one not in public employment, 136 ALR 543.

Privilege regarding communication to police or other officer respecting commission of crime. 140 ALR 1466.

94-2810. (10998) Threatening to publish libel—offer to prevent publication, with intent to extort money. Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort money or other valuable consideration from any person, is guilty of a misdemeanor.

History: En. Sec. 439, Pen. C. 1895; re-en. Sec. 8334, Rev. C. 1907; re-en. Sec. 10998, R. C. M. 1921. Cal. Pen. C. Sec. 257.

Collateral References

Threats ← 1 (1). 86 C.J.S. Threats and Unlawful Communications § 3 et seq.

94-2811. (10999) Giving false information for publication. Any person who willfully states, delivers, or transmits, by any means whatsoever, to the manager, editor, publisher, or reporter of any newspaper, magazine, publication, periodical, or serial, for publication therein, any false or libelous statement concerning any person or corporation, and thereby secures the actual publication of the same, is hereby declared guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding five hundred dollars, or confined in the county jail not exceeding six months, or both.

History: En. Sec. 1, Ch. 36, L. 1905; re-en. Sec. 8335, Rev. C. 1907; re-en. Sec. 10999, R. C. M. 1921.

Collateral References Libel and Slander = 147. 53 C.J.S. Libel and Slander § 292.

CHAPTER 29

LEGISLATURE-OFFENSES AGAINST

Section 94-2901. Preventing the meeting or organization of legislative assembly.

94-2902. Disturbing the legislative assembly while in session.

94-2903. Altering draft of bill or resolution.

94-2904. Altering engrossed or enrolled copy of bill or resolution.

94-2905. Giving or offering bribes to members of the legislative assembly. Receiving bribes by members of the legislative assembly.

94-2906.

94-2907. Solicitation of bribes.

94-2908. Bribery of members of legislative assembly.

94-2909. Bribery of public officers generally.

94-2910. 94-2911. Corrupt solicitation of official action constitutes solicitation of bribery.

Personal interest in bill.

94-2912. Witnesses refusing to attend, etc., before the legislative assembly.

Lobbying. 94-2913.

Members of legislative assembly, in addition to other penalties, to for-94-2914.

feit office, etc. 94-2915. Bribery and solicitation of briber 94-2916. Bribery of member of legislature. 94-2917. Acts constituting bribery. Bribery and solicitation of bribery by member of legislature.

94-2918. Acts constituting bribery. 94-2919. Penalties for violation of act.

94-2901. (10834) Preventing the meeting or organization of legislative assembly. Every person who willfully, and by force and fraud, prevents the legislative assembly of this state or either of the houses composing it, or any of the members thereof, from meeting or organizing, is guilty of felony.

History: En. Sec. 160, Pen. C. 1895; re-en. Sec. 8190; Rev. C. 1907; re-en. Sec. 10834, R. C. M. 1921. Cal. Pen. C. Sec. 81.

Collateral References

Disturbance of Public Assemblage. 1. 27 C.J.S. Disturbance of Public Meetings § 1.

94-2902. (10835) Disturbing the legislative assembly while in session. Every person who willfully disturbs the legislative assembly of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house, tending to interrupt its proceedings or impair the respect due its authority, is guilty of a misdemeanor.

History: En. Sec. 161, Pen. C. 1895; re-en. Sec. 8191, Rev. C. 1907; re-en. Sec. 10835, R. C. M. 1921. Cal. Pen. C. Sec. 82.

94-2903. (10836) Altering draft of bill or resolution. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislative assembly, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

History: En. Sec. 162, Pen. C. 1895; re-en. Sec. 8192, Rev. C. 1907; re-en. Sec. 10836, R. C. M. 1921. Cal. Pen. C. Sec. 83.

94-2904. (10837) Altering engrossed or enrolled copy of bill or resolution. Every person who fraudulently alters the engrossed copy or enrollment of any bill or resolution which has been passed or adopted by the legislative assembly of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published by the printer of statutes, in language different from that in which it was passed or adopted by the legislative assembly, is guilty of felony.

History: En. Sec. 163, Pen. C. 1895; re-en. Sec. 8193, Rev. C. 1907; re-en. Sec. 10837, R. C. M. 1921. Cal. Pen. C. Sec. 84.

94-2905. (10838) Giving or offering bribes to members of the legislative assembly. Every person who gives or offers a bribe to any member of the legislative assembly, or to another person for him, or attempts, by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 164, Pen. C. 1895; re-en. Sec. 8194, Rev. C. 1907; re-en. Sec. 10838, R. C. M. 1921. Cal. Pen. C. Sec. 85.

A Felony

Bribery of a member of the legislature is a felony. In re Wellcome, 23 M 140, 145, 58 P 45.

Collateral References

Bribery 2 (2).
11 C.J.S. Bribery §§ 1, 3.
12 Am. Jur. 2d 755 et seq., Bribery, § 12 et seq.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263. Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-2906. (10839) Receiving bribes by members of the legislative assembly. Every member of either of the houses composing the legislative assembly of this state, who asks, receives, or agrees to receive any bribe, upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give any official vote in consideration that another member of the legislative assembly shall give any such vote, either upon the same or another question, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 165, Pen. C. 1895; re-en. Sec. 8195, Rev. C. 1907; re-en. Sec. 10839, R. C. M. 1921. Cal. Pen. C. Sec. 86.

94-2907. (10840) Solicitation of bribes. Every person elected to either house of the legislative assembly who offers or promises to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the legislative assembly, in consideration or upon condition that any other person elected to the same legislative assembly will give, or will promise or assent to give, his vote or influence, in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, is guilty of solicitation of bribery, and is punishable in the state prison not less than one year nor more than ten years.

History: En. Sec. 166, Pen. C. 1895; re-en. Sec. 8196, Rev. C. 1907; re-en. Sec. 10840, R. C. M. 1921.

94-2908. (10841) Bribery of members of legislative assembly. Every member of the legislative assembly who gives his vote or influence for or against any measure or proposition, pending or proposed to be introduced in such legislative assembly, or offers, promises, or assents to give the same, upon condition that any other member will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced in such legislative assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, is guilty of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 167, Pen. C. 1895; re-en. Sec. 8197, Rev. C. 1907; re-en. Sec. 10841, R. C. M. 1921.

94-2909. (10842) Bribery of public officers generally. Every person who, directly or indirectly, offers, gives, or promises any money or thing of value, testimonial, privilege, or personal advantage to any executive or judicial officer, or member of the legislative assembly, or to any public officer of the state, or of any municipal division thereof, to influence him in the performance of any of his official or public duties, is guilty of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 168, Pen. C. 1895; re-en. Sec. 8198, Rev. C. 1907; re-en. Sec. 10842, R. C. M. 1921.

Collateral References

Bribery ← 1 (1).

11 C.J.S. Bribery §§ 1, 2.

12 Am. Jur. 2d 755 et seq., Bribery, § 12 et seq.

94-2910. (10843) Corrupt solicitation of official action constitutes solicitation of bribery. Every person who corruptly solicits, directly or indirectly, the official action of any member of the legislative assembly, or of any public officer of the state, or of any municipal division thereof, is guilty of the occupation and practice of solicitation of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 169, Pen. C. 1895; re-en. Sec. 8199, Rev. C. 1907; re-en. Sec. 10843, R. C. M. 1921.

94-2911. (10844) Personal interest in bill. Every member of the legislative assembly who has a personal or private interest in any measure or bill, proposed or pending before the legislative assembly of which he is a member, and does not disclose the fact to the house of which he is a member, and votes thereon, is guilty of a misdemeanor.

History: En. Sec. 170, Pen. C. 1895; re-en. Sec. 8200, Rev. C. 1907; re-en. Sec. 10844, R. C. M. 1921.

94-2912. (10845) Witnesses refusing to attend, etc., before the legislative assembly. Every person who, being summoned to attend as a witness before either house of the legislative assembly, or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislative assembly, or any committee thereof, willfully refuses to be sworn, or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

History: En. Sec. 171, Pen. C. 1895; re-en. Sec. 8201, Rev. C. 1907; re-en. Sec. 10845, R. C. M. 1921. Cal. Pen. C. Sec. 87.

Collateral References States 34, 39½. 81 C.J.S. States § 45.

Power of legislative body or committee to compel attendance of nonmember as witness. 50 ALR 21 and 65 ALR 1518.

94-2913. (10846) Lobbying. Every person who obtains, or seeks to obtain money or other thing of value from another person, upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of any legislative body in regard to any

vote or legislative matter, is guilty of felony. Upon the trial no person, otherwise competent as a witness, shall be excused from testifying as such concerning the offense charged, on the ground that such testimony may criminate himself, or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding, except for perjury in giving such testimony.

History: En. Sec. 172, Pen. C. 1895; re-en. Sec. 8202, Rev. C. 1907; re-en. Sec. 10846, R. C. M. 1921. Cal. Pen. C. Sec. 89.

12 Am. Jur. 2d 752, 755-758, Bribery, §§ 5, 12-14; 21 Am. Jur. 2d 215 et seq., Criminal Law, §146 et seq.; 58 Am. Jur. 73 et seq., Witnesses, § 86 et seq.

Collateral References

Bribery 21 (1); Witnesses 296, 297. 11 C.J.S. Bribery §§ 1, 2; 98 C.J.S. Witnesses § 434 et seq.

Validity of lobbying contract. 29 ALR 157 and 67 ALR 684.

Constitutionality of statute as to lobbying. 63 ALR 941.

94-2914. (10847) Members of legislative assembly, in addition to other penalties, to forfeit office, etc. Every member of the legislative assembly convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 173, Pen. C. 1895; re-en. Sec. 8203, Rev. C. 1907; re-en. Sec. 10847, R. C. M. 1921. Cal. Pen. C. Sec. 88.

Collateral References States@=52. 81 C.J.S. States § 33.

94-2915. (10848) Bribery and solicitation of bribery by member of legislature. Any person elected to either house of the legislative assembly, who shall offer or promise to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the legislative assembly, in consideration or upon condition that any other person elected to the same legislative assembly will give or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, shall be deemed guilty of solicitation of bribery. Any member of the legislative assembly who shall give his vote or influence for or against any measure or proposition pending or proposed to be introduced in such legislative assembly, or offer, promise, or assent so to, upon condition that any other member will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislative assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, shall be deemed guilty of bribery.

History: En. Sec. 1, p. 44, L. 1893; re-en. Sec. 174, Pen. C. 1895; re-en. Sec. 8204, Rev. C. 1907; re-en. Sec. 10848, R. C. M. 1921.

11 C.J.S. Bribery §§ 1, 3. 12 Am. Jur. 2d 755-758, Bribery, §§ 12-14.

Collateral References Bribery 1 (2).

Court's power to correct date of offense. 7 ALR 1531 and 68 ALR 928.

94-2916. (10849) Bribery of member of legislature. Any person who shall, directly or indirectly offer, give or promise any money or thing of value, testimonial, privilege, or personal advantage, to any executive or

judicial officer or member of the legislative assembly, to influence him in the performance of any of his official or public duties, shall be deemed guilty of bribery.

History: En. Sec. 2, p. 44, L. 1893; re-en. Sec. 175, Pen. C. 1895; re-en. Sec. 8205, Rev. C. 1907; re-en. Sec. 10849, R. C. M. 1921.

94-2917. (10850) Acts constituting bribery. Any person or persons who shall give, or promise, or offer to give or promise, any member of either house of the legislative assembly any money, office, paper, or property, or other valuable thing, or shall offer to do for such member, or any member of his family, relative, or other person, anything not common to the people of the state, county, township, or community in which such person resides, in consideration that such member shall vote in either house of the legislative assembly in any given way, or in consideration that such member shall do, or omit to do, anything pertaining to his office or duty as a member of such legislative assembly, shall be deemed guilty of bribery.

History: En. Sec. 3, p. 44, L. 1893; reen. Sec. 176, Pen. C. 1895; re-en. Sec. 8206, Rev. C. 1907; re-en. Sec. 10850, R. C. M. 1921.

94-2918. (10851) Acts constituting bribery. Any person or persons who shall, directly or indirectly, give any money, property, or other valuable thing, or make any promise of any kind whatever, with the intent to have it proffered to such member of the legislative assembly to influence his vote or action in connection with his said office by any other person than himself, or shall aid or abet in the commission of the offense described in the two preceding sections of this act, shall be deemed guilty of bribery.

History: En. Sec. 4, p. 45, L. 1893; re-Rev. C. 1907; re-en. Sec. 10851, R. C. M. en. Sec. 177, Pen. C. 1895; re-en. Sec. 8207,

94-2919. (10852) Penalties for violation of act. Every person convicted of violating any of the provisions of this act shall be punishable by imprisonment in the state penitentiary for a term of not less than five years nor more than twenty years, or by a fine not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment, and shall be forever disqualified from voting or holding any office in this state; and any member of the legislative assembly, or person elected thereto, who shall be convicted of violating any of the provisions of this act shall, in addition to the punishment above prescribed, be expelled therefrom.

History: En. Sec. 5, p. 45, L. 1893; reen. Sec. 178, Pen. C. 1895; re-en. Sec. 8208, Rev. C. 1907; re-en. Sec. 10852, R. C. M. 1921.

Collateral References

Bribery 16; States 52. 11 C.J.S. Bribery § 20; 81 C.J.S. States § 33.

CHAPTER 30

LOTTERIES

Section 94-3001. Lottery defined.
94-3002. Drawings for prizes or premiums not contemplated by act, when.
94-3003. Punishment for drawing lottery.
94-3004. Punishment for selling lottery tickets.

Aiding lotteries.

94-3006. Lottery offices—advertising lottery offices.

94-3007. Insuring lottery tickets—publishing offers to insure. Property offered for disposal in lottery forfeited.

94-3009. Letting building for lottery purposes. 94-3010. Lotteries out of this state.

94-3011. Punishment.

94-3001. (11149) Lottery defined. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

History: En. Sec. 580, Pen. C. 1895; re-en. Sec. 8406, Rev. C. 1907; re-en. Sec. 11149, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1935, Cal. Pen. C. Sec. 319.

Cross-Reference.

Gambling, sec. 94-2401 et seq.

Amendment of Constitution

Proposed initiative measure No. 63, which would legalize lotteries and repeal sections 94-3001 to 94-3011, could not be considered as an amendment to the Montana constitution where it did not comply with sections 8 or 9, article XIX, which set forth the manner of constitutional amendment. State ex rel. Steen v. Murray, 144 M 61, 394 P 2d 761, 764.

"Bank Night" Drawings at Theaters

In an action by the state to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the defendant corporation in the theater buildings, and not from the sale of admission tickets to the theater," held, on the facts presented, that the scheme did not constitute a lottery, and State ex rel. Dussault v. Fox Missoula Theatre Corporation, 110 M 441, 101 P 2d 1065 overruled, and second part of section 2, article XIX of the constitution is not self-executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 57, 70, 132 P 2d 689.

Held, on the authority of State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 132 P 2d 689, that in the absence of a showing that the winner of a prize offered by a theater on "bank night," had paid a valuable consideration for the chance to win, the finding of the court that the scheme constituted a lottery under this section and as such a nuisance under section 94-1002, was error. State ex rel. Smith v. Fox Missoula Theatre Corporation, 114 M 102, 103, 132 P 2d 711.

Initiative Measure Unconstitutional

Proposed initiative measure No. 63, which would legalize lotteries and repeal sections 94-3001 to 94-3011, is unconstitutional. State ex rel. Steen v. Murray, 144 M 61, 394 P 2d 761, 763, 764.

"Keno" Held Gambling Game

In State v. Hahn, 105 M 270, 72 P 2d 459, a game in all essentials the same as the game of "keno" described in the instant case, was held to be a lottery and prohibited by sections 94-3001 to 94-3011. In scores of other cases "keno" has been held to be a game of chance within the meaning of statutes prohibiting gambling. Gambling is a generic term, embracing within its meaning all forms of play or game for stakes wherein one or the other participating stands to win or lose as a matter of chance. Play at lottery is gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 504, 146 P 2d 168.

"Lottery," What Constitutes—Requisites

The legal requisites necessary to charge the offense of operating a lottery under this section are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. State v. Hahn, 105 M 270, 273, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Numbers Games

A numbers game, whether called Chinese lottery, "The Crown Game," "The Crown punchboard game" or any other name is a lottery. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032,

"Pay" a "Valuable Consideration" Distinguished from "Furnishing"

The words "pay" a "valuable consideration" used in this section are not synonymous with furnishing a good consideration required as the basis for an enforceable contract according to the context, and their approved usage. "Consideration" is defined by section 13-501 as that which is paid to the promisor "as an inducement." Held, that what can be obtained free cannot be said to have been induced by a consideration; hence one purchasing an admission ticket in order to obtain a chance to win which he can have free of charge, does not pay consideration for the gratuity. State ex rel. Stafford v. Fox-Great Falls Treatre Corporation, 114 M 52, 65, 132 P 2d 689.

Punch Boards

Punch boards constitute a lottery. State ex rel. Harrison v. Deniff, 126 M 109, 245

P 2d 140, 141.

In an action for violation of this section it was no defense that the defendant had offered to pay for the operation of such punch boards in accordance with chapter 201, Laws 1951, which purports to license trade stimulators such as punch boards since it is not competent for the legislature to authorize lotteries in view of section 2, article 19 of the constitution and the case of State ex rel. Harrison v. Deniff. State v. Tursich, 127 M 504, 267 P 2d 641, 642.

Receipt of Something Extra When Purchasing Commodity or Service at Regular Price, Not a Lottery

Where, to advertise or develop a legitimate business, patrons receive gratuitously something extra, whether a chance to participate in a drawing, or an oatmeal dish, when purchasing an actual commodity or service sold at the regular price, without subterfuge, and receive that article not measurably cheapened, all of what the patron pays is obviously consideration for the commodity or service itself, and therefore no part of the money paid can be held consideration for the chance itself; and the scheme cannot be held a lottery. State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 80, 132 P 2d 689.

"Skill Ball"-Sufficiency of Charge

Where county attorney first set out his charge in the language of this section and then proceeded to set out in detail the game, held that while it is conceivable that in pursuing this method a prosecutor might plead himself out of court by detailing facts which when challenged by demurrer would show themselves to be without the ban of the statute, it was not

true of this information because the essential elements were supplied by the particulars. State v. Hahn, 105 M 270, 274, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marck, 124 M 178, 220 P 2d 1017, 1019; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Test Whether Game One of Skill or Chance

To defeat a charge of conducting a lottery (styled "skill ball") it is not enough that some skill is involved in the game, the test to be applied in determining whether a game is one of skill or chance being, not whether it contains an element of skill or an element of chance, but which of the two is the dominating element that determines the result of the game. State v. Hahn, 105 M 270, 274, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Whether Prize Cash or Merchandise Immaterial

To constitute a lottery, it is immaterial whether the prize be given in cash or in merchandise so long as it was awarded by chance and a consideration paid for that chance. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Valuable Consideration

Where one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. State v. Cox, 136 M 507, 349 P 2d 104. (State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 132 P 2d 689, distinguished.)

Collateral References

Lotteries 3.

54 C.J.S. Lotteries § 1.

34 Am. Jur., Lotteries, p. 646, § 2; p. 664 et seq., § 22 et seq.

Trading-stamp schemes as lotteries or gift enterprises. 26 ALR 724; 124 ALR 345 and 133 ALR 1087.

Scheme by which award depends upon votes as a lottery. 41 ALR 1484.

Scheme for advertising or stimulating legitimate business as a lottery. 48 ALR 1115; 57 ALR 424; 103 ALR 866 and 109 ALR 709; 113 ALR 1121.

Statute exempting scheme for benefit of public, religious or charitable purposes from statute against lotteries. 103 ALR 875.

"Numbers game" or "policy game" as a lottery, 105 ALR 305.

Private rights and remedies growing out of prize-winning contests. 87 ALR 2d 649.

94-3002. (11149.1) Drawings for prizes or premiums not contemplated by act, when. This act shall not apply to the giving away of cash or merchandise attendance prizes or premiums by public drawings at agricultural fairs or rodeo associations in this state, and the county fair commissioners of agricultural fairs or rodeo associations in this state may give away at such fairs cash or merchandise attendance prizes or premiums by public drawings.

History: En. Sec. 2, Ch. 36, L. 1935.

94-3003. (11150) Punishment for drawing lottery. Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

History: En. Sec. 581, Pen. C. 1895; re-en. Sec. 8407, Rev. C. 1907; re-en. Sec. 11150, R. C. M. 1921.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marck, 124 M 178, 220 P 2d 1017, 1019; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Collateral References

Lotteries \$21. 54 C.J.S. Lotteries §28. 34 Am. Jur. 664, Lotteries, §23.

Entrapment to commit offense with respect to gambling or lotteries. 31 ALR 2d 1212.

94-3004. (11151) Punishment for selling lottery tickets. Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor.

History: En. Sec. 582, Pen. C. 1895; re-en. Sec. 8408, Rev. C. 1907; re-en. Sec. 11151, R. C. M. 1921. Cal. Pen. C. Sec. 321.

Immaterial, if Based on Nonexistent Lottery

In a proceeding to enjoin a theater corporation from operating "bank night" drawings as a nuisance under the lottery statute, section 94-3001, the sole question under the pleadings was whether a lottery was being conducted, not whether defendant was violating this section; hence

where the evidence fails to prove the existence of a lottery, as held in the instant case, the claim advanced thereafter on appeal that there was also a violation of this section, becomes immaterial. State ex rel. Stafford v. Fox-Great Falls Theatre Corporation, 114 M 52, 69, 132 P 2d 689.

Collateral References

Lotteries \$\sim 23.
54 C.J.S. Lotteries \$\§ 22, 28.
34 Am. Jur. 665, Lotteries, \§ 24.

94-3005. (11152) Aiding lotteries. Every person who aids or assists, either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

History: En. Sec. 583, Pen. C. 1895; re-en. Sec. 8409, Rev. C. 1907; re-en. Sec. 11152, R. C. M. 1921. Cal. Pen. C. Sec. 322.

Collateral References Lotteries©23. 54 C.J.S. Lotteries § 23.

94-3006. (11153) Lottery offices — advertising lottery offices. Every person who opens, sets up or keeps, by himself, or by any other person, any office or any other place for the sale of, or for registering the number of any ticket in any lottery within or without this state, or who by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of, any such office is guilty of a misdemeanor.

History: En. Sec. 584, Pen. C. 1895; re-en. Sec. 8410, Rev. C. 1907; re-en. Sec. 11153, R. C. M. 1921. Cal. Pen. C. Sec. 323.

34 Am. Jur. 666, 668, Lotteries, §§ 25, 27.

Collateral References
Lotteries 22.
54 C.J.S. Lotteries 20 et seq.

Scheme for advertising or stimulating legitimate business as lottery. 48 ALR 1115; 57 ALR 424; 103 ALR 866; 109 ALR 709 and 113 ALR 1121.

94-3007. (11154) Insuring lottery tickets—publishing offers to insure. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum or deliver the same, or any other property if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn at any particular time, or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency, dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

History: En. Sec. 585, Pen. C. 1895; re-en. Sec. 8411, Rev. C. 1907; re-en. Sec. 11154, R. C. M. 1921. Cal. Pen. C. Sec. 324. Collateral References
Lotteries 24.
54 C.J.S. Lotteries 20.

94-3008. (11155) Property offered for disposal in lottery forfeited. All moneys or property offered for sale or distribution in violation of any of the provisions of this chapter, are forfeited to the state, and may be recovered by information filed, or by an action brought by the attorney general, or by any county attorney in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or, if the suit is in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments are issued from the district courts in civil cases.

History: En. Sec. 586, Pen. C. 1895; re-en. Sec. 8412, Rev. C. 1907; re-en. Sec. 11155, R. C. M. 1921. Cal. Pen. C. Sec. 325.

Collateral References Lotteries \$29. 54 C.J.S. Lotteries \$29.

94-3009. (11156) Letting building for lottery purposes. Every person who lets or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing, any

lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

History: En. Sec. 587, Pen. C. 1895; re-en. Sec. 8413, Rev. C. 1907; re-en. Sec. 11156, R. C. M. 1921. Cal. Pen. C. Sec. 326.

94-3010. (11157) Lotteries out of this state. The provisions of this chapter are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state or country where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

History: En. Sec. 588, Pen. C. 1895; re-en. Sec. 8414, Rev. C. 1907; re-en. Sec. 11157, R. C. M. 1921.

94-3011. (11158) Punishment. Every person convicted of any of the offenses mentioned in this chapter, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 589, Pen. C. 1895; re-en. Sec. 8415, Rev. C. 1907; re-en. Sec. 11158, R. C. M. 1921.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marck, 124 M 178, 220 P 2d 1017, 1019; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029, 1032.

Collateral References

Lotteries 30. 54 C.J.S. Lotteries § 28.

CHAPTER 31

MACHINE GUN ACT

Section 94-3101. Definitions.

94-3102. Possession or use of machine gun-when unlawful.

94-3103. Punishment for possession or use of machine gun for offensive purpose. 94-3104. Presumption of possession or use for offensive or aggressive purpose. 94-3105. Presence of gun as evidence of possession or use.

94-3106. Exceptions.

94-3107. Manufacturer to keep register of machine guns-contents-inspec-

tion—penalty for failure to keep.

Registration of machine guns now in state and hereafter acquired— 94-3108. presumption from failure to register.

94-3109. Warrant to search for and seize machine guns-confiscation of guns.

94-3110. Uniformity of interpretation.

94-3111. Short title.

94-3101. (11317.1) **Definitions.** "Machine gun" applies to and includes a weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, or automatically, or semiautomatically discharged from a magazine, by a single function of the firing device.

"Crime of violence" applies to and includes any of the following crimes or an attempt to commit any of the same, namely, murder, manslaughter, kidnaping, rape, mayhem, assault to do great bodily harm, robbery, burglary, housebreaking, breaking and entering, and larceny.

"Person" applies to and includes firm, partnership, association or corporation.

History: En. Sec. 1, Ch. 43, L. 1935.

Weapons 4.
94 C.J.S. Weapons § 1.

94-3102. (11317.2) Possession or use of machine gun—when unlawful. Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than twenty years.

History: En. Sec. 2, Ch. 43, L. 1935.

Collateral References Weapons \$\infty\$-4. 94 C.J.S. Weapons \§ 6.

94-3103. (11317.3) Punishment for possession or use of machine gun for offensive purpose. Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten years.

History: En. Sec. 3, Ch. 43, L. 1935.

- 94-3104. (11317.4) Presumption of possession or use for offensive or aggressive purpose. Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:
- (a) When the machine gun is on premises not owned or rented, for bona fide permanent residence or business occupancy, by the person in whose possession the machine gun may be found; or
- (b) When in the possession of, or used by, an unnaturalized foreignborn person, or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions; or
- (c) When the machine gun is of the kind described in section 94-3108 and has not been registered as in said section required; or

(d) When empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity thereof.

History: En. Sec. 4, Ch. 43, L. 1935.

Collateral References
Weapons©=17 (2).
94 C.J.S. Weapons § 13.

94-3105. (11317.5) Presence of gun as evidence of possession or use. The presence of a machine gun in any room, boat, or vehicle shall be evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

History: En. Sec. 5, Ch. 43, L. 1935.

94-3106. (11317.6) Exceptions. Nothing contained in this act shall prohibit or interfere with:

1. The manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose;

- 2. The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;
- 3. The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

History: En. Sec. 6, Ch. 43, L. 1935.

94-3107. (11317.7) Manufacturer to keep register of machine guns—contents—inspection—penalty for failure to keep. Every manufacturer shall keep a register of all machine guns manufactured or handled by him. This register shall show the model and serial number, date of manufacture, sale, loan, gift, delivery or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given or delivered, or from whom it was received; and the purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given or delivered, or from whom received. Upon demand every manufacturer shall permit any marshal, sheriff or police officer to inspect his entire stock of machine guns, parts, and supplies therefor, and shall produce the register, herein required, for inspection. A violation of any provision of this section shall be punishable by a fine of not less than one hundred dollars (\$100.00).

History: En. Sec. 7, Ch. 43, L. 1935.

94-3108. (11317.8) Registration of machine guns now in state and hereafter acquired—presumption from failure to register. Every machine gun now in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered in the office of the secretary of state, on the effective date of this act, and annually thereafter. If acquired hereafter it shall be registered within twenty-four hours after its acquisition. Blanks for registration shall be prepared by the secretary of state, and furnished upon application. To comply with this section the application as filed must show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired. The registration data shall not be subject to inspection by the public. Any person failing to register any gun as required by this section, shall be presumed to possess the same for offensive or aggressive purpose.

History: En. Sec. 8, Ch. 43, L. 1935.

Compiler's Note

The effective date of this act was February 20, 1935.

Collateral References Weapons©≈12, 17 (2). 94 C.J.S. Weapons §§ 11, 13.

94-3109. (11317.9) Warrant to search for and seize machine guns—confiscation of guns. Warrant to search any house or place and seize any machine gun adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber possessed in violation of this act, may issue in the same manner and under the same restrictions as provided by law for stolen property, and any court of record, upon application of the county attorney, shall have jurisdiction and power to order any machine gun, thus or otherwise legally

seized, to be confiscated and either destroyed or delivered to a peace officer of the state or a political subdivision thereof.

History: En. Sec. 9, Ch. 43, L. 1935.

94-3110. (11317.10) Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 11, Ch. 43, L. 1935.

94-3111. (11317.11) Short title. This act may be cited as the Uniform Machine Gun Act.

History: En. Sec. 12, Ch. 43, L. 1935.

CHAPTER 32

MALICIOUS INJURIES TO RAILROADS, HIGHWAYS AND OTHER PROPERTY

Section 94-3201. Repealed.

94-3202. Injuries to milestones, guideposts, trees.

94-3203. Tampering with telegraph, telephone and electric systems—penalty.

94-3204. Taking water from or obstructing canals. 94-3205. Interferences with railroad property.

94-3206. Punishment.

94-3207. Acts causing death punished as murder.

94-3208. Remove waste or packing from locomotives or motors.

94-3209. Repealed. 94-3210. Highway construction—leaving hard substance on railroad intersec-

tion-penalty.

94-3211. Removal, injury or destruction of telephone, telegraph and electric facilities-penalty.

94-3201. (11464) Repealed—Chapter 197, Laws of 1965.

Repeal and bridges, was repealed by Sec. 12-109, Section 94-3201 (Sec. 1031, Pen. C. Ch. 197, Laws 1965. See sec. 32-4402. 1895), relating to injuries to highways

94-3202. (11465) Injuries to milestones, guideposts, trees. (1) Every person who maliciously removes or injures any mileboard, post, or stone, or guidepost or any inscription on such, erected on any highway, is guilty of a misdemeanor.

Every person who maliciously injures or destroys any shade or ornamental tree on any highway is guilty of a misdemeanor.

History: En. Sec. 1032, Pen. C. 1895; 11465, R. C. M. 1921; amd. Sec. 12-107, re-en. Sec. 8737, Rev. C. 1907; re-en. Sec. Ch. 197, L. 1965. Cal. Pen. C. Sec. 590.

(11466) Tampering with telegraph, telephone and electric systems—penalty. Any person who maliciously and willfully taps, or makes any connection with any telegraph or telephone line, wire, cable, or instrument, or electric power line, wire or cable belonging to another, or maliciously and willfully reads, takes or copies any messages, communication or report intended for another passing over any such telegraph or telephone line, wire, or cable, in this state, or who willfully and maliciously prevents, obstructs or delays by any means or contrivance whatsoever the sending, transmission, conveyance or delivery in this state of any message, communication or report by or through any telegraph or telephone line, wire

or cable or who uses any apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned, or who aids, agrees with, employs or conspires with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000,00) or imprisonment in the county jail not exceeding one year, or both, in the discretion of the court. And it shall be unlawful for any person who, for nonpayment of dues, tolls, or other good and sufficient reasons, has been disconnected from service with any telephone, telegraph or electric light or power system in this state to connect or allow himself to be connected with any such company lines without direct and express permission from the official authorized to permit such reconnection. Any person or persons who shall violate or cause to be violated this provision shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) or imprisonment in the county jail for ten days, or both, in the discretion of the court.

History: En. Sec. 1033, Pen. C. 1895; re-en. Sec. 8738, Rev. C. 1907; re-en. Sec. 11466, R. C. M. 1921; re-en. Sec. 1, Ch. 66, L. 1929; amd. Sec. 2, Ch. 174, L. 1963. Cal. Pen. C. Sec. 591.

Collateral References

Electricity ← 21.
29 C.J.S. Electricity §§ 76, 77.
52 Am. Jur. 96, Telegraphs and Telephones, § 65.

94-3204. (11467) Taking water from or obstructing canals. Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume or reservoir, used for the purpose of holding or conveying water for manufacturing, agricultural, mining or domestic uses, or who, without like authority, shall raise, lower, or otherwise disturb any gate or other appurtenance thereof used for the control or the measurement of water, or who shall empty or place, or cause to be emptied or placed into any such canal, ditch, flume or reservoir, any rubbish, filth or obstruction to the free flow of the water, is guilty of a misdemeanor.

History: En. Sec. 1034, Pen. C. 1895; re-en. Sec. 8739, Rev. C. 1907; re-en. Sec. 11467, R. C. M. 1921. Cal. Pen. C. Sec. 592.

Collateral References
Canals 24.
12 C.J.S. Canals §§ 19, 24, 28.

94-3205. (11468) Interferences with railroad property. Every person who, within the state of Montana, willfully and maliciously either—

1. Burns, breaks, cuts, derails, destroys, displaces, injures, obstructs, removes or places any explosive substance upon, in or under, any track, switch, bridge, culvert, viaduct, roadbed, embankment, reservoir, water tank, standpipe or appurtenances, station or section house, coal dock, passenger, mail, baggage, express or freight car, caboose, engine, tender or other rolling stock, or other appliance, part, structure, or fixture attached to, or used in connection with any operated railway, or any branch thereof, lying wholly or partially within this state, whether operated by steam or other motive power; or by letter or other writing, threatens to do, any of the foregoing acts or things; or,

- 2. Wrecks, whether by the use of dynamite or other explosive or any other means, any moving train, engine, cars or other rolling stock of any such railroad or branch; or,
- 3. By intimidating any member of a train or engine crew, or any passenger, or otherwise stops, holds up, or interrupts the journey of any such train, engine, cars or rolling stock, of any such railway, or branch thereof, for the purpose of gaining from any person, by any means, any money or other thing of value;

shall be deemed guilty of felony, and on conviction be punished by imprisonment in the state prison for a term not less than five years, and which may extend to the term of his natural life.

History: Ap. p. Sec. 1030, Pen. C. 1895; en. Sec. 1, Ch. 24, L. 1905; re-en. Sec. 8740, Rev. C. 1907; re-en. Sec. 11468, R. C. M. 1921, Cal. Pen. C. Sec. 587.

Cross-Reference

Offer of reward for arrest of train robbers, sec. 94-401-2.

Collateral References

Railroads \$255 (1-6).
75 C.J.S. Railroads \$1005 et seq.

94-3206. (11469) Punishment. Any person who willfully and maliciously attempts to commit any of the acts enumerated in the preceding section shall be deemed guilty of a felony, and punished by imprisonment in the state prison for not less than one year nor more than ten years.

History: En. Sec. 2, Ch. 24, L. 1905; re-en. Sec. 8741, Rev. C. 1907; re-en. Sec. 11469, R. C. M. 1921.

94-3207. (11470) Acts causing death punished as murder. If in the commission, or attempts to commit, any of the acts made felonies under section 94-3205 of these codes the death of any person shall be caused, the person so committing, or attempting to commit said acts or any thereof, shall be deemed guilty of murder in the first degree; and, on conviction thereof, shall suffer death.

History: En. Sec. 3, Ch. 24, L. 1905; re-en. Sec. 8742, Rev. C. 1907; re-en. Sec. 11470, R. C. M. 1921.

Collateral References

Homicide ₹ 18 (1). 40 C.J.S. Homicide § 21, 31-33. 40 Am. Jur. 2d 336, Homicide, § 46.

94-3208. (11472) Remove waste or packing from locomotives or motors. If any person shall willfully and maliciously take or remove the waste or packing or brass or brasses from any journal box or boxes of any locomotive, engine, tender, carriage, coach, car, caboose or truck, used or operated or capable of being used or operated upon any railroad, hoisting engines, threshing machines, pumps or any other machinery, whether the same be operated by steam or electricity, the person so offending shall be guilty of a misdemeanor and on conviction shall be sentenced to pay a fine of not more than one hundred dollars nor less than fifty dollars or by imprisonment in the county jail not more than six months, or both such fine and imprisonment

History: En. Sec. 1, Ch. 46, L. 1903; re-en. Sec. 8744, Rev. C. 1907; re-en. Sec. 11472, R. C. M. 1921.

Collateral References

Malicious Mischief □1.
54 C.J.S. Malicious Mischief § 1.
34 Am. Jur. 691, Malicious Mischief,
§§ 11, 12.

94-3209. (11473) Repealed—Chapter 174, Laws of 1963.

Repeal tric lines or apparatus, was repealed by Sec. 3, Ch. 174, Laws 1963. Section 94-3209 (Sec. 1, Ch. 71, L. 1903), relating to interference with elec-

94-3210. (11473.1) Highway construction—leaving hard substance on railroad intersection—penalty. Every person who, within the state of Montana while engaged in public or private road work, or otherwise, and whether willfully, carelessly or negligently, leaves or deposits any earth, gravel, rock, or other hard substances, alongside of, upon, or between, the rails of any railroad, where any public or private highway crosses such railroad which will, by filling the grooves for the flanges of the wheels or otherwise endanger travel on such railroad and which may tend to or does derail locomotives or cars thereon shall be guilty of a misdemeanor and on conviction shall be fined not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100.00), or by imprisonment in the county jail not more than six (6) months, or both such fine and imprisonment.

History: En. Sec. 1, Ch. 41, L. 1927.

Collateral References

Railroads = 12, 255 (5). 74 C.J.S. Railroads § 194; 75 C.J.S. Railroads § 1007.

94-3211. Removal, injury or destruction of telephone, telegraph and electric facilities—penalty. Any person who willfully and maliciously displaces, removes, injures or destroys any public telephone instrument or any part thereof or any equipment or facilities associated therewith, or who enters or breaks into any coin box associated therewith, or who willfully and maliciously cuts, breaks, displaces, removes, injures or destroys any microwave facilities or any telegraph or telephone line, wire, cable, pole or conduit or an electric power line, cable, transformer, pole or conduit or facilities associated therewith belonging to another or the material or property appurtenant thereto is guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars (\$1,000.00) or by imprisonment in the state prison for not more than five (5) years, or by both such fine and imprisonment.

History: En. 94-3211 by Sec. 1, Ch. 174, L. 1963.

Collateral References

Electricity 21; Telecommunications 362.

29 C.J.S. Electricity § 77; 86 C.J.S. Telegraphs, Telephones, Radio, and Television 120.

52 Am. Jur. 96, Telegraphs and Telephones, § 65.

CHAPTER 33

MALICIOUS MISCHIEF GENERALLY

Section 94-3301.

Malicious injury or destruction of property—punishment. Specifications in following sections not restriction. 94-3302. 94-3303.

Burning buildings, etc., not the subject of arson. Destruction of buildings by explosives—punishment. 94-3304.

Use of automobiles without consent of owners—punishment. 94-3305.

94-3306. Possessing automobile from which number or marks have been removed or altered.

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94-3307. Possessing automobile from which number or marks have been re-
                    moved or altered-penalty.
94-3308. Malicious injuries to freehold.
94-3309. Injuring fences, building fires and hunting on premises of another
                    when forbidden.
94-3310. Injuries to standing crops, etc. 94-3311. Removing, defacing or altering landmarks. 94-3312. Destruction of fence or inclosure.
                Destruction of fence or inclosure.
94-3313. Destroying or injuring jails.
94-3314. Destroying or injuring dams, etc. 94-3315. Burning or injuring rafts, setting adrift vessels.
94-3316. Obstructing navigable rivers.
94-3317. Injuries to United States surveyors' monuments.
94-3318. Destroying or tearing down notices.
94-3319. Injuring or destroying written instrument.
94-3320. Opening or publishing sealed letters, 94-3321. Disclosing contents of telegraphic message.
94-3322. Altering telegraphic messages.
94-3323. Opening telegrams.
94-3324. Injuring works of art or improvements.
94-3325. Destroying works of literature, etc., in public libraries.
94-3326. Breaking or obstructing water pipes, etc.
94-3327. Setting fire to timber, etc., negligently.
94-3328. Setting and negligent control of fires—punishment.
94-3329. Setting fire to timber, etc., maliciously.
94-3330. Exposing infected clothing or person.
94-3331. Driving animals on sidewalk.
94-3332. Malicious spiking of saw logs-penalty.
94-3333. Defacing public buildings.
94-3334. Injury to trees on public lands.
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94-3301. (11474) Malicious injury or destruction of property—punishment. Every person who maliciously injures or destroys any real or personal property not his own, of the value of fifty dollars or over, in cases otherwise than such as are specified in this code, is guilty of a felony, and upon conviction thereof shall be punished by confinement in the state penitentiary for a term of not less than one year or more than five years, and every person who maliciously injures or destroys any real or personal property not his own of the value of less than fifty dollars, in cases otherwise than as specified in this code is guilty of a misdemeanor.

History: En. Sec. 1050, Pen. C. 1895; re-en. Sec. 8746, Rev. C. 1907; amd. Sec. 1, Ch. 10, Ex. L. 1918; re-en. Sec. 11474, R. C. M. 1921. Cal. Pen. C. Sec. 594.

Collateral References

Malicious Mischief №1. 54 C.J.S. Malicious Mischief § 1 et seq. 34 Am. Jur. 688 et seq., Malicious Mischief, § 2 et seq.

94-3302. (11475) Specifications in following sections not restriction. The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section.

History: En. Sec. 1051, Pen. C. 1895; re-en. Sec. 8747, Rev. C. 1907; re-en. Sec. 11475, R. C. M. 1921. Cal. Pen. C. Sec. 595.

Compiler's Note

The "following sections of this chapter" referred to in this section are sections 94-3303 to 94-3334.

94-3303. (11476) Burning buildings, etc., not the subject of arson. Every person who willfully and maliciously burns any bridge exceeding fifty dollars in value, or any building, snowshed or vessel not the subject of arson, or any stack of grain of any kind, or of hay, or any growing or standing grain, grass or tree, or any fence not the property of such person, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 1052, Pen. C. 1895; re-en. Sec. 8748, Rev. C. 1907; re-en. Sec. 11476, R. C. M. 1921. Cal. Pen. C. Sec. 600.

Malicious Destruction of Property Not Included Offense

The malicious destruction of property is not a crime the commission of which is included in the crime of willful and malicious burning of property, as defined by this section. State v. Sieff, 54 M 165, 168, 168 P 524.

Collateral References

Arson 5.

6 C.J.S. Arson § 6.

5 Am. Jur. 2d 801 et seq., Arson and Related Offenses, § 1 et seq.

94-3304. (11477) Destruction of buildings by explosives—punishment. Any person who shall maliciously, by the explosion of gunpowder, nitroglycerin, dynamite or any other explosive substance, blow up, destroy, throw down, or injure the whole or any part of any building, house, edifice, or structure, whether used for habitation, lodgement, abode or shelter of human beings, or for any agricultural, industrial, commercial, manufacturing, storage, milling, smelting, refining, transportation, educational, religious, charitable, scientific, library or art purposes, or any public building or structure owned or occupied by the state of Montana or by any county, city or municipality of the state, or school district, or by the United States government, or any building, house, edifice or structure owned or used by any public utility or public utility corporation or company, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term, where not otherwise provided for in this code, of not less than one year and not more than ten years.

History: En. Sec. 1053, Pen. C. 1895; re-en. Sec. 8749, Rev. C. 1907; amd. Sec. 1, Ch. 9, Ex. L. 1918; re-en. Sec. 11477, R. C. M. 1921, Cal. Pen. C. Sec. 601.

Collateral References

Explosives 4.

35 C.J.S. Explosives §§ 4, 12. 31 Am. Jur. 2d 892, Explosions and Explosives, § 123.

94-3305. (11478) Use of automobiles without consent of owners — punishment. Any chauffeur or other person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building or place, or from any place or locality on a private or public highway, park or parkway, street, lot or field, alley, inclosure, or space, any automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven, for his own profit, use or purpose, or for the profit, use or purpose of another, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1, Ch. 27, L. 1915; amd. Sec. 1, Ch. 91, L. 1919; re-en. Sec. 11478, R. C. M. 1921.

Sentence As Determining Felonious Nature of Violation

Whether act proscribed by this statute is felony or misdemeanor is not determined until sentence is imposed. Gransberry v. State, 149 M 158, 423 P 2d 853.

Statute of Limitations

Defendant was charged with taking and using an automobile without the consent of the owner, under this section, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, under

this case, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by section 94-5703, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. State v. Atlas, 75 M 547, 550, 244 P 477.

Collateral References

Automobiles \$\sim 339.\$ 61 C.J.S. Motor Vehicles § 691 et seq. 7 Am. Jur. 2d 848, Automobiles and Highway Traffic, § 304.

94-3306. (11479) Possessing automobile from which number or marks have been removed or altered. Every person within this state is hereby prohibited from knowingly buying, selling, receiving, disposing of, or concealing, or having in his possession any automobile, motorcar, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motorcar, or motor vehicle.

History: En. Sec. 1, Ch. 48, L. 1917; re-en. Sec. 11479, R. C. M. 1921.

Collateral References

Automobiles 340.
61 C.J.S. Motor Vehicles § 688.
7 Am. Jur. 2d 853, Automobiles and Highway Traffic, § 308.

94-3307. (11480) Possessing automobile from which number or marks have been removed or altered—penalty. Any person violating the provisions of the preceding section, and any person who shall knowingly buy, sell, receive, dispose of or conceal, or have in his possession, any automobile, motorear or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motorcar or motor vehicle, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than two hundred dollars, or imprisonment not more than six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 48, L. 1917; re-en. Sec. 11480, R. C. M. 1921.

94-3308. (11481) Malicious injuries to freehold. Every person who willfully or maliciously commits any trespass by either—

- 1. Cutting down, destroying or injuring any kind of wood or timber standing or growing upon the lands of another; or
 - 2. Carrying away any kind of timber or wood lying on such lands; or
- 3. Maliciously injuring or severing from the freehold of another anything attached thereto or the produce thereof; or
- 4. Digging, taking or carrying away from any lot situated within the limits of any incorporated city without the license of the owner or legal occupant thereof, any earth, soil, or stone; or
- 5. Digging, taking or carrying away from any land in any cities of the state, laid down on the map or plan of said cities otherwise recognized or established as a street or alley, avenue or park, without the license of the proper authorities, any earth, soil or stone; or
- 6. Putting up, fastening, printing or painting upon any property belonging to the state, or to any city, county, town or village, or dedicated to

the public or upon any property of any person without license of the owner any notice, advertisement or designation thereof, or any name of any commodity, whether for sale or otherwise, or any picture, sign or device intended to call attention thereto; or

- 7. Hunting, without permission, upon the inclosed premises of another; or
- 8. Destroying, defacing or injuring any door, window or other portion of any vacant residence or other building, or maliciously opening any closed door or window of such buildings, or entering therein or on without the consent of the owner, agent or tenant of such premises or by authority of law; is guilty of misdemeanor.

History: Ap. p. Sec. 1054, Pen. C. 1895; amd. Sec. 1054, Ch. 64, L. 1903; en. Sec. 1, Ch. 10, L. 1905; re-en. Sec. 8750, Rev. C. 1907; re-en. Sec. 11481, R. C. M. 1921. Cal. Pen. C. Sec. 602.

94-3309. (11482) Injuring fences, building fires and hunting on premises of another when forbidden. Any person tearing down, breaking, or injuring any fence or other inclosure, for the purpose of entering upon the land or premises of another without the consent of the owner or occupant; any person who shall build a fire upon the land or premises of another within any inclosure, or who shall sever from such land or premises any tree, grass, or other product thereof, or shall take therefrom anything attached or appurtenant thereto, without the consent of the owner or occupant; and any person who shall hunt upon any inclosed land or premises where there is posted in a conspicuous place a sign or warning reading, "No hunting allowed on these premises," or a sign or warning reading, "No trespassing allowed on these premises," without the consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than ten dollars, nor more than five hundred dollars, or imprisonment not exceeding six months in the county jail, or by both such fine and imprisonment; and shall also be liable to the person injured for all damages occasioned thereby.

History: En. Sec. 1, Ch. 36, L. 1915; re-en. Sec. 11482, R. C. M. 1921.

Trespassing Hunter

Where land is inclosed a person who hunts thereon without the consent of one entitled to its possession is a trespasser, and where land is posted warning persons against hunting thereon, he who does so in disregard of such warning is subject to criminal prosecution under this section. Herrin v. Sutherland, 74 M 587, 241 P 328.

Collateral References

Fences 28 (1); Fires 1; Malicious Mischief 1,

36A C.J.S. Fences § 18; 36A C.J.S. Fires § § 2-5, 9; 54 C.J.S. Malicious Mischief § 1. 35 Am. Jur. 2d 437, Fences, § 43; 35 Am. Jur. 2d 585, Fires, § 5; 35 Am. Jur. 2d 657, Fish and Game, § 16.

94-3310. (11483) Injuries to standing crops, etc. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not prescribed by these codes, is guilty of a misdemeanor.

History: En. Sec. 1055, Pen. C. 1895; re-en. Sec. 8751, Rev. C. 1907; re-en. Sec. 11483, R. C. M. 1921. Cal. Pen. C. Sec. 604.

Collateral References

Crops \$≈ 8. 25 C.J.S. Crops \$10. 34 Am. Jur. 691, Malicious Mischief, \$12.

94-3311. (11484) Removing, defacing or altering landmarks. Every person who either—

Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or,

2. Willfully or maliciously defaces or alters the marks upon any such monument; or.

Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks, is guilty of a misdemeanor.

History: En. Sec. 1056, Pen. C. 1895; re-en. Sec. 8752, Rev. C. 1907; re-en. Sec. 11484, R. C. M. 1921. Cal. Pen. C. Sec. 605. Collateral References Boundaries 56. 11 C.J.S. Boundaries §§ 126, 127.

94-3312. (11485) Destruction of fence or inclosure. Every person who willfully and maliciously cuts, tears down, removes, or in any other manner injures or destroys any fence or other inclosure of lands, other than public. belonging to another, is guilty of a misdemeanor, and upon conviction is punishable by a fine not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than thirty days or more than six months, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 41, L. 1903; re-en. Sec. 8753, Rev. C. 1907; re-en. Sec. 11485, R. C. M. 1921.

Collateral References Fences 28 (1). 36A C.J.S. Fences § 18. 35 Am. Jur. 2d 437, Fences, § 43.

94-3313. (11486) Destroying or injuring jails. Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding ten thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 148, p. 214, Bannack Stat.; re-en. Sec. 177, p. 310, Cod. Stat. 1871; re-en. Sec. 177, 4th Div. Rev. Stat. 1879; re-en. Sec. 220, 4th Div. Comp. Stat.

1887; amd. Sec. 1057, Pen. C. 1895; re-en. Sec. 8754, Rev. C. 1907; re-en. Sec. 11486, R. C. M. 1921. Cal. Pen. C. Sec. 606.

94-3314. (11487) Destroying or injuring dams, etc. Every person who willfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir or other structure erected to create hydraulic power, or to store or to conduct water for mining, manufacturing, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them, or willfully or maliciously makes or causes to be made any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same, is punishable by a fine not less than one hundred dollars, or by imprisonment in the county jail not exceeding two years or both.

Stat.; re-en. Sec. 176, p. 310, Cod. Stat. 1871; re-en. Sec. 176, 4th Div. Rev. Stat. 1879; re-en. Sec. 219, 4th Div. Comp. Stat.

History: En. Sec. 147, p. 214, Bannack 1887; amd. Sec. 1058, Pen. C. 1895; re-en. Sec. 8755, Rev. C. 1907; re-en. Sec. 11487, R. C. M. 1921, Cal. Pen. C. Sec. 607.

94-3315. (11488) Burning or injuring rafts, setting adrift vessels. Every person who willfully and maliciously burns, injures or destroys any

pile or raft of wood, plankboards, or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks, or sets adrift any vessel or boat, the property of another, is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 146, p. 214, Bannack Stat.; re-en. Sec. 175, p. 310, Cod. Stat. 1871; re-en. Sec. 175, 4th Div. Rev. Stat. 1879; re-en. Sec. 218, 4th Div. Comp. Stat. 1887; amd. Sec. 1059, Pen. C. 1895; re-en. Sec. 8756, Rev. C. 1907; re-en. Sec. 11488, R. C. M. 1921. Cal. Pen. C. Sec. 608.

94-3316. (11489) Obstructing navigable rivers. Every person who unlawfully obstructs the navigation of any navigable stream, is guilty of a misdemeanor.

History: En. Sec. 1060, Pen. C. 1895; re-en. Sec. 8757, Rev. C. 1907; re-en. Sec. 11489, R. C. M. 1921, Cal. Pen. C. Sec. 611. Collateral References
Navigable Waters 27.
65 C.J.S. Navigable Waters § 52.

Pollution of oyster beds. 3 ALR 762. Pollution of stream by mining operations. 39 ALR 891.

94-3317. (11490) Injuries to United States surveyors' monuments. Every person who willfully injures, defaces or removes any monument erected, or marked or used by the surveyors of the United States to designate a point or corner in a survey under authority of the United States is guilty of a misdemeanor.

History: En. Sec. 1061, Pen. C. 1895; re-en. Sec. 8758, Rev. C. 1907; re-en. Sec. 11490, R. C. M. 1921. Cal. Pen. C. Sec. 615.

94-3318. (11491) **Destroying or tearing down notices.** Every person who intentionally—

- 1. Defaces, obliterates, tears down, or destroys any copy or transcript, or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notification set up at any place in this state by authority of any law of the United States or of this state, or by order of any court, before the expiration of the time for which the same was to remain set up; or,
- 2. Defaces, obliterates, tears or destroys any notice placed or posted on a mining claim, or removes or destroys any stake or monument placed thereon to identify it,

is punishable by imprisonment in the county jail not exceeding three months or by a fine not exceeding one hundred dollars, or both.

History: En. Sec. 1062, Pen. C. 1895; re-en. Sec. 8759, Rev. C. 1907; re-en. Sec. 11491, R. C. M. 1921. Cal. Pen. C. Sec. 616.

94-3319. (11492) Injuring or destroying written instrument. Every person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 1063, Pen. C. 1895; re-en. Sec. 8760, Rev. C. 1907; re-en. Sec. 11492, R. C. M. 1921, Cal. Pen. C. Sec. 617.

94-3320. (11493) Opening or publishing sealed letters. Every person who willfully opens or reads, or causes to be read any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

History: En. Sec. 116, p. 205, Bannack Stat.; re-en. Sec. 129, p. 298, Cod. Stat. 1871; re-en. Sec. 129, 4th Div. Rev. Stat. 1879; re-en. Sec. 138, 4th Div. Comp. Stat.

1887; amd. Sec. 1064, Pen. C. 1895; re-en. Sec. 8761, Rev. C. 1907; re-en. Sec. 11493, R. C. M. 1921. Cal. Pen. C. Sec. 618.

94-3321. (11494) Disclosing contents of telegraphic message. Every person who willfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1065, Pen. C. 1895; re-en. Sec. 8762, Rev. C. 1907; re-en. Sec. 11494, R. C. M. 1921. Cal. Pen. C. Sec. 619.

Collateral References

Telecommunications \$\sim 362.
86 C.J.S. Telegraphs, Telephones, Radio and Television § 117.

Cross-Reference

Secretly learning contents of telegram, sec. 94-35-220.

94-3322. (11495) Altering telegraphic messages. Every person who willfully alters the purport, effect, or meaning of a telegraphic message to the injury of another, is punishable as provided in the preceding section.

History: En. Sec. 1066, Pen. C. 1895; re-en. Sec. 8763, Rev. C. 1907; re-en. Sec. 11495, R. C. M. 1921, Cal. Pen. C. Sec. 620.

Cross-Reference

Forgery of messages, sec. 94-2005.

94-3323. (11496) Opening telegrams. Every person not connected with any telegraph office who, without the authority or the consent of the person to whom the same may be directed, willfully opens any sealed envelope enclosing a telegraphic message and addressed to another person, with the purpose of learning the contents of such message, or who fraudulently represents another person and thereby procures to be delivered to himself any telegraphic message addressed to such person, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, is punishable as provided in section 94-3321.

History: En. Sec. 1067, Pen. C. 1895; re-en. Sec. 8764, Rev. C. 1907; re-en. Sec. 11496, R. C. M. 1921. Cal. Pen. C. Sec. 621.

94-3324. (11497) Injuring works of art or improvements. Every person, not the owner thereof, who willfully injures, disfigures, or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor.

History: En. Sec. 1068, Pen. C. 1895; re-en. Sec. 8765, Rev. C. 1907; re-en. Sec. 11497, R. C. M. 1921. Cal. Pen. C. Sec. 622.

Not Limited to Incorporated Cities and Towns

An illustration is found in this section

of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

94-3325. (11498) Destroying works of literature, etc., in public libraries. Every person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus or other work of literature, art or mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair, or exhibition, is guilty of felony.

History: En. Sec. 1069, Pen. C. 1895; re-en. Sec. 8766, Rev. C. 1907; re-en. Sec. 11498, R. C. M. 1921. Cal. Pen. C. Sec. 623.

94-3326. (11499) Breaking or obstructing water pipes, etc. Every person who willfully breaks, digs up, obstructs, or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is guilty of a misdemeanor.

History: En. Sec. 1070, Pen. C. 1895; re-en. Sec. 8767, Rev. C. 1907; re-en. Sec. 11499, R. C. M. 1921. Cal. Pen. C. Sec. 624.

Collateral References

Gas⇔23; Waters and Water Courses⇔212.
38 C.J.S. Gas § 5; 93 C.J.S. Waters § 313.

94-3327. (11500) Setting fire to timber, etc., negligently. Every person who carelessly sets fire to any timber, woodland or grass, except for useful or necessary purposes, or who at any time makes a campfire, or lights a fire for any purposes whatever without taking sufficient steps to secure the same from spreading from the immediate locality where it is used, or fails to extinguish such fire before leaving it, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 178, p. 310, Cod. Stat. 1871; re-en. Sec. 178, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 48, L. 1881; re-en. Sec. 221, 4th Div. Comp. Stat. 1887; amd. Sec. 1071, Pen. C. 1895; re-en. Sec. 8768, Rev. C. 1907; re-en. Sec. 11500, R. C. M. 1921.

Collateral References

Fires 3.
36A C.J.S. Fires §§ 2-5.
35 Am. Jur. 2d 585, Fire, §§ 5, 6.

94-3328. (11501) Setting and negligent control of fires—punishment. Every person who shall negligently or carelessly set fire, or cause to be set on fire any woods, timber, prairie, or other combustible material, whether on his own land or not, by means whereby the property of another shall be endangered, or who shall negligently suffer any fire upon his own lands, or lands occupied by him, to extend beyond the limits thereof, shall be guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the

county jail for not less than one month, nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 13, Ex. L. 1918; re-en. Sec. 11501, R. C. M. 1921.

94-3329. (11502) Setting fire to timber, etc., maliciously. Every person who wantonly or designedly sets fire to any timber, woodland or grass, or maliciously fails to extinguish a fire after making the same for a necessary purpose, before leaving it, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 179, p. 311, Cod. Stat. 1871; re-en. Sec. 179, 4th Div. Rev. Stat. 1879; amd. Sec. 2, p. 49, L. 1881; re-en. Sec. 222, 4th Div. Comp. Stat. 1887; amd.

Sec. 1072, Pen. C. 1895; re-en. Sec. 8769, Rev. C. 1907; re-en. Sec. 11502, R. C. M. 1921.

94-3330. (11503) Exposing infected clothing or person. Every person who exposes any clothing or person infected with the smallpox, or other contagious disease, with intent to cause the spread of such disease, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1073, Pen. C. 1895; re-en. Sec. 8770, Rev. C. 1907; re-en. Sec. 11503, R. C. M. 1921.

Collateral References Health \$\infty\$37. 39 C.J.S. Health \\$\\$ 30, 31.

94-3331. (11504) Driving animals on sidewalk. Every person who, will-fully and without authority, drives any team, vehicle or animal along or upon a sidewalk in a town or city, is punishable by imprisonment in the county jail not exceeding one month, or by a fine not exceeding fifty dollars, or both.

History: En. Sec. 1074, Pen. C. 1895; re-en. Sec. 8771, Rev. C. 1907; re-en. Sec. 11504, R. C. M. 1921.

Not Limited to Incorporated Cities and Towns

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Collateral References

Municipal Corporations \$\infty 604, 707. 62 C.J.S. Municipal Corporations § 213.

94-332. (11505) Malicious spiking of saw logs—penalty. It shall be unlawful for any person to maliciously drive, place or embed any spike, nail or other metallic substance, stone or rock in any saw logs intended for manufacture into lumber or other timber products, and any person violating the provisions of this act shall be guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than five years, or by fine not less than one hundred dollars nor more than one thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1, Ch. 66, L. 1917; re-en. Sec. 11505, R. C. M. 1921. Cal. Pen. C. Sec. 593a.

Collateral References

Logs and Logging \$37.
54 C.J.S. Logs and Logging \$89.
34 Am. Jur. 565, Logs and Timber,
§115.

94-333. (11506) Defacing public buildings. Every person who willfully breaks, defaces or otherwise injures any church, schoolhouse or other

public building, or any part thereof, or appurtenance thereto, or the windows or doors of the same, or any book, furniture, ornament or musical instrument or other chattel therein used, is guilty of a misdemeanor.

History: En. Sec. 1075, Pen. C. 1895; re-en. Sec. 8772, Rev. C. 1907; re-en. Sec. 11506, R. C. M. 1921.

94-3334. (11507) Injury to trees on public lands. Every person who commits a trespass on or any injury to any state lands or the improvements thereon, or who, without the proper authority, cuts, fells, girdles, injures or destroys any trees or timber upon any of the school, university or other state lands, or removes or attempts to remove the same, or knowingly purchases or receives such trees or timber, or advises the removal thereof, is guilty of a misdemeanor, and is also liable to the state for three (3) times the value of said trees or timber, or lumber into which the same are converted.

All fines collected and all moneys recovered by virtue of this section must be paid into the trust fund if the lands involved are held in trust either through deed or grant or be paid to the funds of the state departments administrating such lands where lands not held in trust are involved.

History: Ap. p. Sec. 1, p. 256, L. 1891; en. Sec. 1076, Pen. C. 1895; re-en. Sec. 8773, Rev. C. 1907; re-en. Sec. 11507, R. C. M. 1921; amd. Sec. 1, Ch. 221, L. 1955.

Cross-Reference

Committing waste or trespass on state lands, penalty, sec. 94-1518.

CHAPTER 34

MAYHEM

Section 94-3401. Mayhem defined. 94-3402. Mayhem—how punishable.

94-3401. (10968) Mayhem defined. Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

History: En. Sec. 42, p. 184, Bannack Stat.; re-en. Sec. 45, p. 277, Cod. Stat. 1871; re-en. Sec. 45, 4th Div. Rev. Stat. 1879; re-en. Sec. 45, 4th Div. Comp. Stat. 1887; amd. Sec. 370, Pen. C. 1895; re-en. Sec. 8304, Rev. C. 1907; re-en. Sec. 10968, R. C. M. 1921. Cal. Pen. C. Sec. 203.

Operation and Effect

A testicle of a male human being is a "member of the body," within the meaning of this section. State v. Sheldon, 54 M 185, 190, 169 P 37.

Collateral References

Mayhem € 1.

57 C.J.S. Mayhem § 1 et seq.

36 Am. Jur. 2 et seq., Mayhem and Related Offenses, § 2 et seq.

Mayhem as dependent on part of body injured and extent of injury. 16 ALR 955 and 58 ALR 1320.

Mayhem by use of poison or acid. 58 ALR 1328.

94-3402. (10969) Mayhem—how punishable. Mayhem is punishable by imprisonment in the state prison not exceeding fourteen years.

History: En. Sec. 42, p. 184, Bannack Stat.; re-en. Sec. 45, p. 277, Cod. Stat. 1871; re-en. Sec. 45, 4th Div. Rev. Stat. 1879; re-en. Sec. 45, 4th Div. Comp. Stat. 1887; en. Sec. 371, Pen. C. 1895; re-en.

Sec. 8305, Rev. C. 1907; re-en. Sec. 10969, R. C. M. 1921, Cal. Pen. C. Sec. 204.

Collateral References

Mayhem € 7. 57 C.J.S. Mayhem § 12.

MISCELLANEOUS OFFENSES

CHAPTER 35

MISCELLANEOUS OFFENSES

| | | MISCELLANEOUS OFFENSES |
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| CCCCIOII | 94-3502. | Adulterating foods, drugs, liquors, etc. |
| | 94-3503. | Adulterated candies. |
| | 94-3504. | Altering brands. |
| | 94-3505. | Apothecary omitting to label drugs or labeling them wrongfully, etc. |
| | 94-3506. | Arrests, seizure or levy upon property, dispossession of lands with- |
| | | out lawful authority, issuance by justice of the peace of writs or |
| | | process signed in blank. |
| | 94-3507. | Attorneys—misconduct by. |
| | 94-3508. | Attorneys—buying demands or suits by. |
| | 94-3509. | Attorneys forbidden to defend prosecutions carried on by their part- |
| | 04 9510 | ners or formerly by themselves. |
| | 94-3510. 94-3511. | Attorney may defend self. |
| | 94-3512. | Barber business—conducting on Sunday. Penalty. |
| | 94-3513. | Repealed. |
| | 94-3514. | Brands—sash or frying pan prohibited. |
| | 94-3515. | Branding animals driven through the state. |
| | 94-3516. | Branding stock driven into or through state required. |
| | 94-3517. | Branding stock driven into or through state required—road brand. |
| | 94-3518. | Sheep brands. |
| | 94-3519. | Penalties. |
| | 94-3520. | Duty of officers. |
| | 94-3521. | Fines, how disposed of. |
| | 94-3522. 94-3523. | Branding cattle running at large. Bribing members of city or town councils, boards of county com- |
| | J±*0040. | missioners or trustees. |
| | 94-3524. | Bringing armed men into the state. |
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| | | punishment. |
| | 94-3526. | Carrying certain concealed weapons outside of cities or towns for- |
| | 04.9595 | bidden—punishment. |
| | 94-3527. | Carrying certain concealed weapons outside of cities or towns for- bidden—punishment—who excepted from act. |
| | 94-3527.1. | Possession of weapon by prisoner. |
| | 94-3528. | Arrest without warrant—duty of peace officers. |
| | 94-3529. | Concealed weapons—district judge may issue permits to carry. |
| | 94-3530. | Definition of concealed weapons. |
| | 94-3531. | Definition of unincorporated town. |
| | 94-3532. | Jurisdiction of courts. |
| | 94-3533. | Common barratry defined—how punished. |
| | 94-3534. | What proof is required. |
| | 94-3535. 94-3536. | Compounding crimes. Compulsory company boardinghouses. |
| | 94-3537. | Compulsory company boardinghouses—penalty. |
| | 94-3538. | Consequence of resisting process after a county has been declared |
| | | in a state of insurrection. |
| | 94-3539. | Contracting or solemnizing incestuous or forbidden marriages. |
| | 94-3540. | Criminal contempt. |
| | 94-3541. | Cruel treatment of lunatics, etc. |
| | 94-3542. | Dead animals—offal, etc.—putting in streets, rivers, etc. |
| | 94-3543. | Deadly weapons—exhibiting in rude, etc., manner or using the same unlawfully. |
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| | 94-3548. | Defendant fraudulently concealing his property. |
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CRIMES AND CRIMINAL PROCEDURE

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| 94-3556. | Deceived employees—action for damages. |
| 94-3557. 94-3558. | Discrimination by hospitals forbidden. |
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| 94-3563. | Disturbance of railway trains—punishment. |
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| 94-3577. | Fences, unlawful and dangerous—punishment for. |
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| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3586, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden. |
| 94-3581. 94-3582. 94-3583. 94-3584. 94-3585. | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden. Advertising as a fortuneteller forbidden—penalty for newspapers |
| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3586, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden. |
| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3586, 94-3587, 94-3588, 94-3589, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden—penalty for newspapers accepting advertisement. Fraudulent practices to affect the market price. Fraudulent pretenses relative to birth of infant. |
| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3586, 94-3587, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden—penalty for newspapers accepting advertisement. Fraudulent practices to affect the market price. Fraudulent pretenses relative to birth of infant. Fraudulent pretenses relative to birth of infant. |
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| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3587, 94-3589, 94-3590, 94-3591, 94-3591, 94-3592, 94-3593, 94-3594, 94-3595, 94-3597, 94-3598, 94-3599, 94-3590, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden—penalty for newspapers accepting advertisement. Fraudulent practices to affect the market price. Fraudulent pretenses relative to birth of infant. Fraudulent pretenses relative to birth of infant—substituting one child for another. Gas masks to be provided employees handling crude oil and gas—requirement. Penalties. Glanders—animal having, to be killed. Glanders—using or exposing animal with glanders. Grand juror acting after challenge has been allowed. Habeas corpus—refusing to issue or obey writ of. Reconfining persons discharged upon writ of habeas corpus. Concealing persons entitled to benefit of habeas corpus. Health laws—willful violation of. Health laws—neglecting to perform duties under. |
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| 94-3581, 94-3582, 94-3583, 94-3584, 94-3585, 94-3587, 94-3589, 94-3590, 94-3591, 94-3592, 94-3593, 94-3594, 94-3595, 94-3597, 94-3598, 94-3599, 94-3591, | Flag—desecration of. Meaning of term "flag." Exceptions. Forcible entry and detainer. Fortunetelling, etc., forbidden. Advertising as a fortuneteller forbidden—penalty for newspapers accepting advertisement. Fraudulent practices to affect the market price. Fraudulent pretenses relative to birth of infant. Fraudulent pretenses relative to birth of infant—substituting one child for another. Gas masks to be provided employees handling crude oil and gas—requirement. Penalties. Glanders—animal having, to be killed. Glanders—using or exposing animal with glanders. Grand juror acting after challenge has been allowed. Habeas corpus—refusing to issue or obey writ of. Reconfining persons discharged upon writ of habeas corpus. Concealing persons entitled to benefit of habeas corpus. Health laws—willful violation of. Health laws—neglecting to perform duties under. Horses, etc.—taking up or restraining, without owner's consent—penalty. |
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94-3501. (10918) Administrator, etc., must file report—penalty. Any administrator, executor, or guardian, who shall fail to make, render, or file any account, report, or statement in any estate in his charge within the time required by him by law, may be, by the court within which the estate is being administered, summarily punished by a fine in any sum not exceeding

one hundred dollars, and may be committed to jail until payment be made, and his letters may be by the court summarily revoked.

History: En. Sec. 272, Pen. C. 1895; re-en. Sec. 8254, Rev. C. 1907; re-en. Sec. 10918, R. C. M. 1921.

Collateral References

Executors and Administrators 467;

Guardian and Ward 137.

34 C.J.S. Executors and Administrators § 835; 39 C.J.S. Guardian and Ward §§ 143-

94-3502. (11241) Adulterating foods, drugs, liquors, etc. Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor or wine, or any article used in compounding them, with a fraudulent intent, to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

History: En. Sec. 682, Pen. C. 1895; re-en. Sec. 8490, Rev. C. 1907; re-en. Sec. 11241, R. C. M. 1921. Cal. Pen. C. Sec. 382.

Cross-Reference

Selling tainted food, penalty, sec. 94-

Collateral References

Druggists 12; Food 12. 28 C.J.S. Druggists §§ 5, 12, 14; 36A C.J.S. Food §§ 21, 22, 26-28.

35 Am. Jur. 2d 857, 863 et seq., Food, §§ 64, 74 et seq.

Entrapment to violate Pure Food and Drug Act. 18 ALR 187; 66 ALR 478 and 86 ÅLR 263.

Constitutionality of regulations forbidding adulteration of milk. 18 ALR 244; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243 and 155 ALR 1383.

Violation of Pure Food Act as "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1016.

Preservative as adulterant within statute in relation to food. 50 ALR 76.

Statutory provisions relating to purity of food products as applicable to foreign substances which get into products as a result of accident or negligence, and not by purpose or design. 98 ALR 1496.

Penal offense predicated upon violation of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 755.

94-3503. (11265) Adulterated candies. Every person who shall, by himself, his servant or agent, or as the servant or agent of any other person or corporation, manufacture for sale, or knowingly sell or offer to sell, any candy adulterated by the admixture of terra alba, barytes, talc, or any mineral substance, by poisonous colors or flavors or other ingredients deleterious or detrimental to health, is guilty of a misdemeanor.

History: En. Sec. 702, Pen. C. 1895; 8533, Rev. C. 1907; re-en. Sec. 11265, R. amd. Sec. 1, p. 151, L. 1899; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 402a.

94-3504. (11211) Altering brands. Every person who marks or brands, alters or defaces the mark or brand, of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat, or pig, belonging to another, with intent thereby to steal the same or to prevent identification thereof by the true owner, is punishable by fine not to exceed five hundred dollars, or imprisonment in the state prison not to exceed five years, or both.

History: En. Sec. 67, p. 100, Bannack 1871; re-en. Sec. 78, 4th Div. Rev. Stat. Stat.; re-en. Sec. 78, p. 284, Cod. Stat. 1879; re-en. Sec. 86, 4th Div. Comp. Stat. 1887; amd. Sec. 648, Pen. C. 1895; re-en. Sec. 8459, Rev. C. 1907; re-en. Sec. 11211, R. C. M. 1921. Cal. Pen. C. Sec. 357.

Collateral References

Animals ≈ 11, 12.
3 C.J.S. Animals §§ 30, 31.
4 Am. Jur. 2d 255-257, Animals, §§ 8, 9.

94-3505. (11238) Apothecary omitting to label drugs or labeling them wrongfully, etc. Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, willfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents upon any box, bottle, or other package, containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

History: En. Sec. 679, Pen. C. 1895; re-en. Sec. 8487, Rev. C. 1907; re-en. Sec. 11238, R. C. M. 1921. Cal. Pen. C. Sec. 380. 25 Am. Jur. 2d 313, Drugs, Narcotics, and Poisons, § 40.

Collateral References
Druggists 52.
28 C.J.S. Druggists §§ 5, 12, 14.

Constitutionality of statute regulating sale of poisons, drugs or medicines. 54 ALR 730.

(10921) Arrests, seizure or levy upon property, dispossession of lands without lawful authority, issuance by justice of the peace of writs or process signed in blank. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person, or detains him against his will, or seizes or levies upon any property, or dispossesses any one of his lands or tenements, without a regular process or lawful authority therefor, is guilty of a misdemeanor. And any justice of the peace who furnishes or causes to be furnished to any person or corporation engaged in the collection business or to any other person or corporation, a summons or writ of attachment or both, or a supply of summonses or writs of attachments or both, signed by such justice of the peace in blank, and not then signed or issued by him in any suit then filed or pending before him, or who so furnishes or causes to be furnished to any such person or corporation any writ of execution or supply of writs of execution signed in blank, and with the intent and purpose that any such summons or writ of attachment may, at the time of signing and delivery thereof, or thereafter, be used by such person or corporation by themselves dating the same, inserting the name of a party plaintiff and defendant and otherwise completing the same and causing service of any such summons to be made or levy upon and seizure of property to be made under any such writ of attachment, or with the intent and purpose that any such writ of execution so signed and delivered in blank may then or thereafter be utilized by such person or corporation by themselves dating the same and entitling the same in any cause of action in which said justice of the peace has theretofore or may thereafter render judgment, shall be guilty of a misdemeanor and on conviction thereof shall forfeit his office and shall be disqualified from thereafter holding the office of justice of the peace.

History: En. Sec. 275, Pen. C. 1895; re-en. Sec. 8357, Rev. C. 1907; re-en. Sec. 10921, R. C. M. 1921; amd. Sec. 1, Ch. 197, L. 1939. Cal. Pen. C. Sec. 146.

Civil Actions against Sheriff and County Attorney

Where plaintiff compromised an action against the sheriff and his surety for false imprisonment for \$1,000 and executed a release of defendants captioned "release in full of all claims" and reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, a subsequent false imprisonment action against the county attorney, who set up the release as a bar, was properly dismissed on motion for

judgment on the pleadings, nothing appearing in the release reserving plaintiff's right to proceed against the county attorney. Beedle v. Carolan, 115 M 587, 590, 148 P 2d 559.

Collateral References

False Personation 1; Justices of the

Peace 10, 30; Officers 121.
35 C.J.S. False Personation §§ 1, 2; 51
C.J.S. Justices of the Peace §§ 9, 23.

47 Am. Jur. 2d 933, Justices of the Peace, § 25; 43 Am. Jur. 126, Public Officers, § 327.

False imprisonment: liability of private citizen for false arrest by officer. 21 ALR

94-3507. (10938) Attorneys — misconduct by. Every attorney who, whether as attorney or as counselor, either:

- 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
 - Willfully delays his client's suit with a view to his own gain; or,
- Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for. is guilty of a misdemeanor.

History: En. Sec. 287, Pen. C. 1895; re-en. Sec. 8269, Rev. C. 1907; re-en. Sec. 10938, R. C. M. 1921. Cal. Pen. C. Sec. 160.

Collateral References

Attorney and Client 33. 7 C.J.S. Attorney and Client § 59.

94-3508. (10939) Attorneys—buying demands or suits by. Every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in an action, with intent to bring suit thereon, is guilty of a misdemeanor.

History: En. Sec. 288, Pen. C. 1895; re-en. Sec. 8270, Rev. C. 1907; re-en. Sec. 10939, R. C. M. 1921. Cal. Pen. C. Sec. 161.

94-3509. (10940) Attorneys forbidden to defend prosecutions carried on by their partners or formerly by themselves. Every attorney who, directly or indirectly, advises in relation to, or aids, or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided, or promoted by any person as county attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner; or who, having himself prosecuted, or in any manner aided or promoted any action or proceeding in any court as county attorney, or other public prosecutor, afterwards, directly or indirectly, advises in relation to, or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, forfeits his license to practice law.

History: En. Sec. 289, Pen. C. 1895; re-en. Sec. 8271, Rev. C. 1907; re-en. Sec. 10940, R. C. M. 1921, Cal. Pen. C. Sec. 162.

Improper Representation

Where prisoner was represented in a second case by court-appointed counsel who had formerly prosecuted him while

serving as county attorney in a case resulting in the prior conviction with which he was charged in the second case, the error, if any, should have been raised in the district court by a writ of error coram nobis and not by habeas corpus proceeding in the supreme court. Butler v. State, 139 M 437, 365 P 2d 822, 823.

94-3510. (10941) Attorney may defend self. The preceding section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally.

History: En. Sec. 290, Pen. C. 1895; re-en. Sec. 8272, Rev. C. 1907; re-en. Sec. 10941, R. C. M. 1921. Cal. Pen. C. Sec. 163.

94-3511. (11040) Barber business—conducting on Sunday. It is unlawful to conduct the business of haircutting, shaving, or shampooing, or to open barbershops for the doing of such business, on Sunday.

History: En. Sec. 531, Pen. C. 1895; re-en. Sec. 8370, Rev. C. 1907; re-en. Sec. 11040, R. C. M. 1921. Cal. Pen. C. Sec. 300.

50 Am. Jur. 820, Sundays and Holidays, 322.

Collateral References

Sunday 5. 83 C.J.S. Sunday §§ 6, 14.

Constitutionality of discrimination by Sunday law or ordinance as between different kinds of business. 119 ALR 752.

94-3512. (11041) Penalty. Any person violating the provisions of this act is guilty of a misdemeanor and upon conviction thereof shall be fined for the first offense not less than fifteen dollars and not to exceed fifty dollars, and for any subsequent violation, a fine not less than twenty-five dollars and not exceeding one hundred dollars shall be imposed.

History: En. Sec. 532, Pen. C. 1895; re-en. Sec. 8371, Rev. C. 1907; re-en. Sec. 11041, R. C. M. 1921.

94-3513. (11296) Repealed—Chapter 171, Laws of 1953.

Repeal was repealed by Sec. 4, Ch. 171, Laws Section 94-3513 (Sec. 752, Pen. C. 1895), relating to boxing and wrestling matches,

94-3514. (11554) Brands—sash or frying pan prohibited. Every person who for the purpose of branding horses, cattle, sheep, goats or any other animal, uses as a brand, a sash, frying pan or any device whatsoever, which can be employed or used to obliterate a brand, and every person who shall use any unrecorded brand which is an infringement upon any recorded brand, or who shall use a like brand in the same position or place recorded by another, is punishable by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both.

History: En. Sec. 1190, Pen. C. 1895; amd. Sec. 1, Ch. 125, L. 1903; re-en. Sec. 8864, Rev. C. 1907; re-en. Sec. 11554, R. C. M. 1921.

Collateral References

Animals \$30. 3 C.J.S. Animals \$30. 4 Am. Jur. 2d 255, Animals, \$8. 94-3515. (11542) Branding animals driven through the state. Every person who owns or has charge of any horses, cattle or sheep which are driven into or through any part of this state, and fails to plainly brand or mark the animals so driven, so that such animals may be readily distinguished from other animals, is punishable by a fine not exceeding three hundred dollars.

History: En. Sec. 1178, Pen. C. 1895; re-en. Sec. 8851, Rev. C. 1907; re-en. Sec. 11542, R. C. M. 1921.

Collateral References
Animals 6.
C.J.S. Animals §§ 24, 25.

94-3516. (11543) Branding stock driven into or through state required. All droves of horses, mules, cattle or sheep which may hereafter be driven from any other state or territory of the United States or any foreign country, into or through any country or counties of this state, shall be plainly branded or marked with one uniform brand or mark.

History: En. Sec. 1, p. 54, L. 1893; 8852, Rev. C. 1907; re-en. Sec. 11543, R. re-en. Sec. 1179, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3517. (11544) Branding stock driven into or through state required —road brand. All such horses, mules and cattle shall be so branded with one distinct ranch or road brand of the owner or owners so as to show distinctly in such place or places as the owner may adopt.

History: En. Sec. 2, p. 54, L. 1893; 8853, Rev. C. 1907; re-en. Sec. 11544, R. re-en. Sec. 1180, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3518. (11545) Sheep brands. All such sheep shall be marked distinctly with such mark or device as may be sufficient to distinguish the same readily should they become intermixed or mingled with other flocks of sheep in this state.

History: En. Sec. 3, p. 54, L. 1893; 8854, Rev. C. 1907; re-en. Sec. 11545, R. re-en. Sec. 1181, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3519. (11546) Penalties. Any such owner or owners, person or persons in charge of such drove of stock which may be driven into or through this state, who shall fail to comply with the provisions of this act, shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, together with costs of suit.

History: En. Sec. 4, p. 54, L. 1893; re-en. Sec. 1182, Pen. C. 1895; re-en. Sec. 8855, Rev. C. 1907; re-en. Sec. 11546, R. C. M. 1921.

Collateral References
Animals \$\infty 13.
3 C.J.S. Animals \$ 33.

94-3520. (11547) **Duty of officers**. It shall be the special duty of the county attorney, sheriff, and any constable of each and every county in this state, to enforce the provisions of this act.

History: En. Sec. 5, p. 54, L. 1893; re-en. Sec. 1183, Pen. C. 1895; re-en. Sec. 8856, Rev. C. 1907; re-en. Sec. 11547, R. C. M. 1921.

Collateral References

Sheriffs and Constables \$35. 80 C.J.S. Sheriffs and Constables §35. 47 Am. Jur. 839 et seq., Sheriffs, Police, and Constables, §26 et seq.

94-3521. (11548) **Fines, how disposed of.** All fines collected under the provisions of this act, shall be paid into the general school fund of the county in which judgment therefor is recovered.

History: En. Sec. 6, p. 54, L. 1893; re-en. Sec. 1184, Pen. C. 1895; re-en. Sec. 8857, Rev. C. 1907; re-en. Sec. 11548, R. C. M. 1921. Collateral References Fines@=20. 36A C.J.S. Fines § 19.

94-3522. (11553) Branding cattle running at large. Every person save only an owner, and he only when branding on his own premises and in the presence of two responsible citizens, who marks or brands any calf or cattle that are running at large between the first day of December, and the tenth day of May of the next ensuing year; and every person who shall at any time brand or cause to be branded or marked, any horse, mule, cattle or head of cattle, sheep, swine, or other animal, one year old or older, with any piece of metal or implement, other than a branding iron, which branding iron shall be of the same design as the brand or mark owned by the party using it; or who shall so mark or brand, or cause to be marked or branded any of the animals aforesaid with any piece or pieces of iron called "running irons," such as bars, rings, half or quarter circles; is punishable by imprisonment in the county jail for not exceeding six months, or by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or both.

History: En. Sec. 1189, Pen. C. 1895, re-en. Sec. 8863, Rev. C. 1907; re-en. Sec. 11553, R. C. M. 1921.

Collateral References
Animals €=6.
3 C.J.S. Animals §§ 24, 25.
4 Am. Jur. 2d 255, Animals, § 8.

94-3523. (10943) Bribing members of city or town councils, boards of county commissioners or trustees. Every person who gives or offers a bribe to any member of any city or town council, board of county commissioners, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before the body of which he is a member, and every member of any of the bodies mentioned in this section who receives, or offers to receive, any such bribe, is punishable by imprisonment in the state prison for a term not less than one nor more than fourteen years, and is disqualified from holding any office in this state.

History: En. Sec. 292, Pen. C. 1895; re-en. Sec. 8274, Rev. C. 1907; re-en. Sec. 10943, R. C. M. 1921. Cal. Pen. C. Sec. 165.

Collateral References

Bribery ≈ 1 (1). 11 C.J.S. Bribery §§ 1, 2. 12 Am. Jur. 2d 755-758, Bribery, §§ 12-14.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263. Officer's lack of authority as affecting

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-3524. (11315) Bringing armed men into the state. Every person who brings into this state an armed person or armed body of men for the preservation of the peace or the suppression of domestic violence, except at the solicitation and by the permission of the legislative assembly or of the governor, is punishable by imprisonment in the state prison not exceeding ten years and by a fine not exceeding ten thousand dollars.

History: En. Sec. 759, Pen. C. 1895; re-en. Sec. 8591, Rev. C. 1907; re-en. Sec. 11315, R. C. M. 1921.

Collateral References
Insurrection and Sedition ←2.
46 C.J.S. Insurrection and Sedition § 3.

94-3525. (11302) Carrying certain concealed weapons in cities or towns forbidden—punishment. Every person who, within the limits of any city or town, carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife having a blade four inches long or longer, razor, not including a safety razor, or other deadly weapon, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment, or may be punished by imprisonment in the state penitentiary for a period not exceeding five years.

History: Earlier acts were Sec. 1, p. 62, L. 1883; re-en. Sec. 66, 4th Div. Comp. Stat. 1887; amd. Sec. 758, Pen. C. 1895; re-en. Sec. 8582, Rev. C. 1907; amd. Sec. 1, Ch. 58, L. 1911.

This section en. Sec. 1, Ch. 74, L. 1919; re-en. Sec. 11302, R. C. M. 1921.

Collateral References

Weapons ≈5-10. 94 C.J.S. Weapons §§ 3-9. 56 Am. Jur. 995 et seq., Weapons and Firearms, § 9 et seq.

Forfeiture of weapon unlawfully carried, before trial of individual offender. 3 ALR 2d 752.

Offense of carrying concealed weapon as affected by manner of carrying or place of concealment. 43 ALR 2d 492.

94-2526. (11303) Carrying certain concealed weapons outside of cities or towns forbidden—punishment. Every person who, without the limits of any city or town, carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife having a blade four inhes long or longer, razor, not including a safety razor not capable of being used as an ordinary razor, or other deadly weapon, shall be punished by imprisonment in the county jail for a term not less than six months nor more than one year, or by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by both such fine and imprisonment.

History: Earlier acts were Sec. 1, Ch. 35, L. 1903; re-en. Sec. 8583, Rev. C. 1907.
This section en. Sec. 2, Ch. 74, L. 1919; re-en. Sec. 11303, R. C. M. 1921.

Collateral References

Weapons ≈5-10.
94 C.J.S. Weapons §§ 3-9.
56 Am. Jur. 995 et seq., Weapons and Firearms, § 9 et seq.

94-3527. (11304) Carrying certain concealed weapons outside of cities or towns forbidden—punishment—who excepted from act. The preceding sections shall not apply to:

- 1. A sheriff or his deputy;
- 2. A marshal or his deputy;
- 3. A constable or his deputy;
- 4. A police officer or policeman;
- 5. A United States marshal or his deputy;
- 6. A person in the secret service of the United States;
- 7. A game warden or his deputy;
- 8. A U.S. forest reserve official or his deputy;
- 9. A person in actual service as a national guardsman;

- 10. A revenue officer or his deputy;
- 11. A person summoned to the aid of either of the foregoing named persons;
- 12. A civil officer or his deputy engaged in the discharge of official business:
- 13. A person authorized by a judge of a district court of this state to carry a weapon;
- 14. The carrying of arms on one's own premises or at his home or place of business;
 - 15. Any peace officer of the state of Montana;
 - 16. United States immigration and naturalization service officers.

History: En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R. C. M. 1921; amd. Sec. 1, Ch. 63, L. 1969.

Collateral References
Weapons ≈ 11.
94 C.J.S. Weapons § 9.
56 Am. Jur. 1001 et seq., Weapons and
Firearms, § 16 et seq.

94-3527.1. Possession of weapon by prisoner. Every prisoner committed to the Montana state prison, who, while at such state prison, or while being conveyed to or from the Montana state prison, or while at a state prison farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, possesses or carries upon his person or has under his custody or control without lawful authority, a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife, razor, not including a safety razor, or other deadly weapon, is guilty of a felony and shall be punishable by imprisonment in the state prison for a term not less than five (5) years nor more than fifteen (15) years. Such term of imprisonment to commence from the time he would have otherwise been released from said prison.

History: En. Sec. 1, Ch. 131, L. 1961.

94-3528. (11305) Arrest without warrant—duty of peace officers. Any person violating any of the provisions of sections 94-3525 and 94-3526 may be arrested without warrant by any peace officer and lodged in a town, city, or county jail; and any peace officer who shall fail or refuse to arrest such person on his own knowledge, or upon information from some credible person, shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars.

History: En. Sec. 4, Ch. 74, L. 1919; re-en. Sec. 11305, R. C. M. 1921.

Collateral References
Arrest € 63 (3).
6 C.J.S. Arrest § 6.
5 Am. Jur. 2d 711 et seq., Arrest, § 22 et seq.

94-3529. (11306) Concealed weapons—district judge may issue permits to carry. Any judge of a district court of this state may grant permission to carry or bear concealed or otherwise a pistol or revolver for a term not exceeding one year. All applications for such permission must be made by petition filed with the clerk of the district court, for the filing of which petition no charge shall be made. The applicant shall, if personally unknown to the judge, furnish proof by a credible witness of his good moral char-

acter and peaceable disposition. No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for six months immediately next preceding the date of such application. A record of permission granted shall be kept by the clerk of the court, which record shall state the date of the application, the date of the permission, the name of the person to whom permission is granted, the name of the judge granting the permission, the name of the person, if any, by whom good moral character and peaceable disposition are proved, and which record must be signed by person who is granted such permission. The clerk shall thereupon issue under his hand and the seal of the court a certificate, in a convenient card form so that the same may be carried in the pocket, stating:

"Permission to authorizing him to carry or bear concealed or otherwise a pistol or revolver for the period of from the date hereof, has been granted by, a judge of the district court of the judicial district of the state of Montana, in and for the county of

"Witness the hand of the clerk and the seal of said court thisday of, 19........

Clerk."

The date of the certificate shall be the date of the granting of such permission. The certificate shall bear upon its face the signature of the person receiving the same. Upon good cause shown the judge granting such permission may, and in his discretion without notice to the person receiving such permission, revoke the same, the date of the revocation being noted by the clerk upon the record kept by him.

All permissions to carry or bear concealed weapons heretofore granted are hereby revoked.

History: En. Sec. 5, Ch. 74, L. 1919; re-en. Sec. 11306, R. C. M. 1921.

Collateral References

Weapons \$12. 94 C.J.S. Weapons §11. 56 Am. Jur. 993, Weapons and Firearms, §5.

94-3530. (11307) **Definition of concealed weapons**. Concealed weapons shall mean any weapon mentioned in the foregoing sections, which shall be wholly or partially covered by the clothing or wearing apparel of the person so carrying or bearing the weapon.

History: En. Sec. 6, Ch. 74, L. 1919; re-en. Sec. 11307, R. C. M. 1921.

Collateral References

Weapons 8.
94 C.J.S. Weapons § 6.
56 Am. Jur. 996, Weapons and Firearms,
§ 10.

94-3531. (11308) Definition of unincorporated town. A town, if unincorporated, within the meaning of this act, shall consist of at least ten dwellings situated so that no one of said buildings is distant from another more than one hundred yards.

History: En. Sec. 7, Ch. 74, L. 1919; re-en. Sec. 11308, R. C. M. 1921.

94-3532. (11309) Jurisdiction of courts. The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act.

History: En. Sec. 8, Ch. 74, L. 1919; re-en. Sec. 11309, R. C. M. 1921.

Collateral References
Criminal Law \$\infty 92.
22 C.J.S. Criminal Law \\$ 127.

94-3533. (10936) Common barratry defined—how punished. Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months, and by fine not exceeding five hundred dollars.

History: En. Sec. 285, Pen. C. 1895; re-en. Sec. 8267, Rev. C. 1907; re-en. Sec. 10936, R. C. M. 1921, Cal. Pen. C. Sec. 158.

Collateral References

Champerty and Maintenance 9.

9 C.J.S. Barratry §§ 1, 2; 14 C.J.S. Champerty and Maintenance § 61.
14 Am. Jur. 2d 854-856, Champerty and

Maintenance, §§ 19, 20.

Offense of barratry; criminal aspects of champerty and maintenance, 139 ALR 620.

94-3534. (10937) What proof is required. No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt and malicious intent to vex and annoy.

History: En. Sec. 286, Pen. C. 1895; re-en. Sec. 8268, Rev. C. 1907; re-en. Sec. 10937, R. C. M. 1921. Cal. Pen. C. Sec. 159.

Collateral References

Champerty and Maintenance 10. 9 C.J.S. Barratry §§ 1, 3; 14 C.J.S. Champerty and Maintenance § 62.

94-3535. (10931) Compounding crimes. Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in cases provided for by law, in which crimes may be compromised by leave of court, is punishable as follows:

- 1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life.
- 2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, where the crime was punishable by imprisonment in the state prison for any other term than for life.
- 3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, where the crime was a misdemeanor.

History: Ap. p. Sec. 108, p. 203, Bannack Stat.; re-en. Sec. 120, p. 296, Cod. Stat. 1871; re-en. Sec. 120, 4th Div. Rev. Stat. 1879; re-en. Sec. 129, 4th Div. Comp. Stat. 1887; en. Sec. 280, Pen. C. 1895; re-en. Sec. 8262, Rev. C. 1907; re-en. Sec. 10931, R. C. M. 1921. Cal. Pen. C. Sec. 153.

Collateral References

Compounding Offenses € 1.

15A C.J.S. Compounding Offenses §§ 1, 3.

15 Am. Jur. 2d 929 et seq., Compounding Crimes, § 1 et seq.

94-3536. (11223) Compulsory company boardinghouses. It shall be unlawful for any person, firm, company, or corporation now operating or

who shall hereafter operate a boardinghouse in connection with their general business, either directly or through others, to compel an employee to board in such boardinghouse against his will.

History: En. Sec. 1, Ch. 102, L. 1903; re-en. Sec. 8472, Rev. C. 1907; re-en. Sec. 11223, R. C. M. 1921.

Collateral References
Master and Servant ≈ 84.
56 C.J.S. Master and Servant § 160 (13).

94-3537. (11224) Compulsory company boardinghouses—penalty. Any person, firm, company, or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars.

History: En. Sec. 2, Ch. 102, L. 1903; re-en. Sec. 8473, Rev. C. 1907; re-en. Sec. 11224, R. C. M. 1921.

94-3538. (11292) Consequence of resisting process after a county has been declared in a state of insurrection. A person who, after the publication of the proclamation authorized by section 94-5312, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the state prison not less than two years.

History: En. Sec. 748, Pen. C. 1895; re-en. Sec. 8572, Rev. C. 1907; re-en. Sec. 11292, R. C. M. 1921. Cal. Pen. C. Sec. 411.

Collateral References
Obstructing Justice 3.
67 C.J.S. Obstructing Justice 2 et seq.

94.3539. (11212) Contracting or solemnizing incestuous or forbidden marriages. Every person authorized to solemnize marriage, who willfully and knowingly solemnizes any incestuous or other marriage forbidden by law, is punishable by a fine not less than one hundred nor more than one thousand dollars, or imprisonment in the county jail not less than one year nor more than two years, or both.

History: En. Sec. 649, Pen. C. 1895; re-en. Sec. 8460, Rev. C. 1907; re-en. Sec. 11212, R. C. M. 1921. Cal. Pen. C. Sec. 359.

Collateral References
Marriage \$\infty\$30.
55 C.J.S. Marriage \$ 30.

94-3540. (10944) Criminal contempt. Every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor:

- 1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
- 2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law.
- 3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court.

- 4. Willful disobedience of any process or order lawfully issued by any court.
- 5. Resistance willfully offered by any person to the lawful order or process of any court.
- 6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question.
- 7. The publication of a false or grossly inaccurate report of the proceedings of any court.
- 8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit, or testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code.

History: En. Sec. 293, Pen. C. 1895; re-en. Sec. 8275, Rev. C. 1907; re-en. Sec. 10944, R. C. M. 1921. Cal. Pen. C. Sec. 166.

Constitutionality

Although a citizen has the right to publish decisions of the supreme court, comment upon them freely and discuss their correctness, he has no right to destroy public confidence in the court and dispose the community to disregard its order or judgments by false and defamatory publications, such conduct constituting an abuse of the liberty of the press, against the contention that contempt proceedings against the press invade the constitutional right of freedom of speech, section 10, art. III of the constitution. In re Nelson, 103 M 43, 57, 60 P 2d 365.

Cause Must Be Pending in Contempt

While any false or grossly inaccurate report of the proceedings of a court published is punishable as a misdemeanor under this section, such publication is punishable as a contempt of court only when published while the cause is still pending. In re Nelson, 103 M 43, 54, 60 P 2d 365.

Criminal and Civil Contempt Distinguished

A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, and is therefore not an offense against the dignity of the court but against the party in whose behalf the violated order is made. Contempts prosecuted to preserve or restore the rights of private parties are civil and remedial in their nature. Pelletier v. Glacier County, 107 M 221, 226, 82 P 2d 595.

Direct and Constructive Contempts Distinguished

A direct contempt is an open insult committed in the presence of the court; and a constructive contempt is an act done not in the presence of the court but at a distance, which tends to belittle, to degrade or to obstruct, interrupt, prevent or embarrass the administration of justice. Pelletier v. Glacier County, 107 M 221, 226, 82 P 2d 595.

False Report on Dissenting Opinion

Contemptuous language published by a newspaper concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but if the language be libelous, the remedy is a civil or criminal action for libel. In re Nelson, 103 M 43, 64, 60 P 2d 365.

Nature of Contempt

Proceedings in contempt are of a criminal nature. State ex rel. Boston & Montana Consol. Copper & Silver Min. Co. v. Judges, 30 M 193, 198, 76 P 10.

Operation and Effect

One guilty of a contempt of court by a willful disobedience of an injunction order lawfully issued, concerning the use of water, may be punished under this section as for a misdemeanor. State ex rel. Flynn v. District Court, 24 M 33, 35, 60 P 493.

Power To Punish for Contempt as Such Not Abrogated

Although the publication of a contemptuous report of the proceedings of a court is punishable as a misdemeanor, this does not deprive the court of the power to punish such act as a contempt. State ex rel. Haskell v. Faulds, 17 M 140, 148, 42 P 285.

Power To Punish for Contempt Is Inherent in the Courts

The power to punish for contempt is inherent in the courts of record of this state, is a part of their very life, and a necessary incident to the exercise of judicial functions. It exists independently of statutes, and cannot be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or actually enforcing their lawful orders. Territory v. Murray, 7 M 251, 257, 15 P 145; State ex rel. Boston & Montana Consol. Copper & Silver Min. Co. v. Judges, 30 M 193, 200, 76 P 10; In re Mettler, 50 M 299, 302, 146 P 747; State ex rel. Metcalf v. District Court, 52 M 46, 48, 155 P 278.

"Report of the Proceedings of a Court"

The publication of an editorial referring to decisions of the supreme court in certain cases, and charging the court with dealing out injustice in such cases and entering into a "dirty deal" in order to do so, constitutes a report of the proceedings of a court within subdivision 7 of this section. State ex rel. Haskell v. Faulds, 17 M 140, 142, 42 P 285.

Report on Judge's Decision

The publication of an article in a newspaper, in effect charging a district judge with wrongdoing in connection with his decision in a cause disposed of by him six months before, did not constitute contempt of court under this section, but fell within the constitutional provision guaranteeing the liberty of the press, for the violation of which privilege the law provides redress for libel by civil, or punishment by criminal action. State ex rel. Metcalf v. District Court, 52 M 46, 54, 155 P 278.

Collateral References

Contempt ≈ 1 et seq. 17 C.J.S. Contempt § 5 et seq. 17 Am. Jur. 2d, Contempt, p. 7, § 4; p. 18 et seq., § 13 et seq.

Contempt for disobedience of orders in criminal matters where beyond court's jurisdiction. 12 ALR 2d 1059.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group. 19 ALR 2d 388.

94-3541. (11214) Cruel treatment of lunatics, etc. Every person guilty of any harsh, cruel, or unkind treatment or any neglect of duty towards any idiot, lunatic, or insane person, is guilty of a misdemeanor.

History: En. Sec. 651, Pen. C. 1895; re-en. Sec. 8462, Rev. C. 1907; re-en. Sec. 11214, R. C. M. 1921. Cal. Pen. C. Sec. 361.

Collateral References
Mental Health \$\iiiis 433.
44 C.J.S. Insane Persons § 77.

94-3542. (11235) Dead animals—offal, etc.—putting in streets, rivers, etc. Every person who puts the carcass of any dead animal, or the offal from any slaughter pen, corral, or butcher shop, into any river, creek, pond, or reservoir, stream, street, alley, public highway, or road in common use, or who attempts to destroy the same by fire within one-fourth mile of any city, town, or village, and every person who puts the carcass of any dead animal, or any offal of any kind, in or upon the borders of any stream, pond, lake, or reservoir, from which water is drawn for the supply of the inhabitants of any city or town in this state, so that the drainage from such carcass or offal may be taken up by or in such stream, pond, lake, or reservoir, or who allows the carcass of any dead animal, or any offal of any kind, to remain in or upon the borders of any such stream, pond, lake, or reservoir within the boundaries of any land owned or occupied by him, or who keeps any horses, mules, cattle, swine, sheep, or livestock of any kind penned, corralled, or housed on, over, or on the borders of any such stream, pond, lake, or reservoir, so that the waters thereof shall become polluted by reason thereof, is guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in section 94-3599.

History: En. Sec. 676, Pen. C. 1895; re-en. Sec. 8484, Rev. C. 1907; re-en. Sec. 11235, R. C. M. 1921. Cal. Pen. C. Sec. 374.

Collateral References
56 Am. Jur. 618, Waters, § 143.

94-3543. (11299) Deadly weapons—exhibiting in rude, etc., manner or using the same unlawfully. Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who in any manner unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor.

History: Earlier acts were Sec. 39, p. 183, Bannack Stat.; re-en. Sec. 62, p. 279, Cod. Stat. 1871; re-en. Sec. 62, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 74, L. 1885; re-en. Sec. 65, 4th Div. Comp. Stat. 1887.

This section en. Sec. 755, Pen. C. 1895; re-en. Sec. 8579, Rev. C. 1907; re-en. Sec. 11299, R. C. M. 1921. Cal. Pen. C. Sec. 417.

Collateral References

Weapons € 14. 94 C.J.S. Weapons §§ 16-18. 6 Am. Jur. 2d 50-52, Assault and Battery, §§ 53, 54; 56 Am. Jur. 994, Weapons and Firearms, § 6 et seq.

Firearm used as a bludgeon as a deadly weapon. 8 ALR 1319.

Cane as a deadly weapon. 30 ALR 815. Unloaded firearm as a dangerous weapon. 4 ALR 1206.

Tear-gas gun as dangerous or deadly weapon within statute inhibiting the carrying of dangerous weapons, 92 ALR 1098,

94-3544. (11229) Death from explosions, etc. Every person having charge of a steam boiler or steam engine, or other apparatus for generating or employing steam, used in any manufactory, or on a railroad, or in any vessel, or in any kind of mining, milling, or mechanical works, who willfully, or from ignorance or neglect, creates or allows to be created such an undue quantity of steam as to burst or break the boiler, engine, or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 670, Pen. C. 1895; re-en. Sec. 8478, Rev. C. 1907; re-en. Sec. 11229, R. C. M. 1921, Cal. Pen. C. Sec. 368.

Collateral References Steam © 1. 82 C.J.S. Steam § 1.

94-3545. (11230) Death from collision on railroads. Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad car, locomotive, or train, who willfully or negligently suffers or causes the same to collide with another car, locomotive, or train, or with any other object or thing, whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 671, Pen. C. 1895; re-en. Sec. 8479, Rev. C. 1907; re-en. Sec. 11230, R. C. M. 1921, Cal. Pen. C. Sec. 369. Collateral References
Railroads \$\iiint_255 (3).
74 C.J.S. Railroads \\$ 456 et seq.

94-3546. (11260) Death from mischievous animals. If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.

History: En. Sec. 697, Pen. C. 1895; re-en. Sec. 8528, Rev. C. 1907; re-en. Sec. 11260, R. C. M. 1921.

Collateral References

Animals \$\sim 57.
3 C.J.S. Animals \$\sim 141, 236, 237, 239, 246-254.

94-3547. (10932) Debtor fraudulently concealing his property. Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 281, Pen. C. 1895; re-en. Sec. 8263, Rev. C. 1907; re-en. Sec. 10932, R. C. M. 1921. Cal. Pen. C. Sec. 154.

Collateral References

Fraudulent Conveyances 329. 37 C.J.S. Fraudulent Conveyances §§ 466, 469.

94-3548. (10933) Defendant fraudulently concealing his property. Every person against whom an action is pending, or against who a judgment has been rendered for the recovery of any personal property, who fraudulently conceals, sells, or disposes of such property, with intent to hinder, delay, or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the preceding section.

History: En. Sec. 282, Pen. C. 1895; re-en. Sec. 8264, Rev. C. 1907; re-en. Sec. 10933, R. C. M. 1921, Cal. Pen. C. Sec. 155.

94-3549. (11210) Defacing marks upon logs, lumber or wood. Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor.

History: En. Sec. 647, Pen. C. 1895; re-en. Sec. 8458, Rev. C. 1907; re-en. Sec. 11210, R. C. M. 1921. Cal. Pen. C. Sec. 356.

Collateral References

Logs and Logging \$37. 54 C.J.S. Logs and Logging §89. 34 Am. Jur. 564, 565, Logs and Timber, §§ 112, 115.

94-3550. (11579) Repealed—Chapter 135, Laws of 1967.

Repeal

Section 94-3550 (Sec. 2514, Civ. C. 1895; Sec. 1, Ch. 9, L. 1917; Sec. 1, Ch. 219, L. 1965), relating to the penalty for defrauding inn- and hotelkeepers, was repealed by Sec. 2, Ch. 135, Laws 1967. For new law, see sec. 94-1831.

94-3551. (11276) Depositing coal slack in streams. All persons owning or having in operation, and all persons who may hereafter own or put in operation in the state of Montana, either in person or by agent, any coal mine on any stream containing fish or water which is used for domestic purposes, or for irrigation, are hereby required to so care for any coal slack or other refuse emanating from such coal mining operation as to prevent the same from mingling with the waters of such streams.

History: En. Sec. 1, p. 165, L. 1901; amd. Sec. 1, Ch. 6, L. 1903; re-en. Sec. 8557, Rev. C. 1907; re-en. Sec. 11276, R. C. M. 1921.

Collateral References

Waters and Water Courses 50. 93 C.J.S. Waters §§ 47, 57. 36 Am. Jur. 410, Mines and Minerals, § 191.

94-3552. (11277) Depositing coal slack in streams—penalty. All persons owning or operating, or who may hereafter own or operate any coal

mine on any stream containing fish or water which is used for domestic purposes, or for irrigation, who shall dump, cart, or deposit, or cause or suffer to be deposited, in such stream any such coal slack or other refuse emanating from such coal mining operation, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be fined in any sum not less than two hundred dollars nor more than five hundred dollars for each and every offense.

History: En. Sec. 1, p. 165, L. 1901; re-en. Sec. 2, Ch. 6, L. 1903; re-en. Sec. 8558, Rev. C. 1907; re-en. Sec. 11277, R. C. M. 1921.

94-3553. (10946) Disclosing fact of indictment having been found. Every grand juror, county attorney, clerk, judge, or other officer who, except by issuing or in executing a warrant of arrest, willfully discloses the fact of an indictment having been found or information filed for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

History: En. Sec. 295, Pen. C. 1895; re-en. Sec. 8277, Rev. C. 1907; re-en. Sec. 10946, R. C. M. 1921. Cal. Pen. C. Sec. 168.

Collateral References

Clerks of Courts 276; District and Prosecuting Attorneys 211; Grand Jury €41; Judges€38; Officers€121. 14 C.J.S. Clerks of Courts §§ 80-82; 27

C.J.S. District and Prosecuting Attorneys § 17; 38 C.J.S. Grand Juries § 43; 48 C.J.S. Judges § 71; 67 C.J.S. Officers § 133.

38 Am. Jur. 2d 984 et seq., Grand Jury, § 39 et seq.; 30A Am. Jur. 55 et seq., Judges, § 86 et seq.; 42 Am. Jur. 253, Prosecuting Attorneys, § 19; 43 Am. Jur. 126, Public Officers, § 327.

94-3554. (10947) Disclosing what transpired before the grand jury. Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he himself, or any other member of the grand jury, may have said, or in what manner he or any other member of the grand jury may have voted on a matter before them, is guilty of a misdemeanor.

History: En. Sec. 296, Pen. C. 1895; re-en. Sec. 8278, Rev. C. 1907; re-en. Sec. 10947, R. C. M. 1921. Cal. Pen. C. Sec. 169.

Collateral References

Grand Jury \$\infty 41. 38 C.J.S. Grand Juries § 43. 38 Am. Jur. 2d 984 et seq., Grand Jury, § 39 et seq.

(11219) Discharged employees—protection of. Every person who violates any of the provisions of sections 41-1309 to 41-1311, relating to the protection of discharged employees, and the prevention of black listing, is guilty of a misdemeanor.

History: En. Sec. 656, Pen. C. 1895; re-en. Sec. 8467, Rev. C. 1907; re-en. Sec. 11219, R. C. M. 1921.

Collateral References Master and Servant €= 18.

56 C.J.S. Master and Servant § 14.

94-3556. (11222) Deceived employees—action for damages. Any workman of this state or any workman of any state who has been or shall be influenced, induced, or persuaded to engage with any person mentioned in section 94-35-256, through or by means of any of the things prohibited by this act, shall have a right of action for recovery of all damages that he has sustained in consequence of the deception, misrepresentation, and false advertising used to induce him to change his place of employment, against any person, corporation, company, or association directly or indirectly procuring such change, and in addition thereto, he shall recover reasonable attorney's fees to be fixed by the court and taxed as costs in any judgment recovered.

History: En. Sec. 3, Ch. 80, L. 1903; re-en. Sec. 8471, Rev. C. 1907; re-en. Sec. 11222, R. C. M. 1921.

94-3557. (11577) Discrimination by hospitals forbidden. Every person, persons, corporation or association conducting a hospital or hospitals not held for private or corporate profit or a hospital or hospitals that are institutions of purely public charity, that exempt themselves or are exempted from any state, county or municipal tax by reason thereof, shall not in any manner discriminate between the patients of any regularly licensed physician by reason of the fact that said physician is not a member of the medical staff of said hospital, or for any other reason, and such hospitals are hereby compelled to admit and care for the patients of any regularly licensed physician or physicians under the same terms and conditions as may be promulgated by the management of said hospital for the patients of any other regularly licensed physician.

History: En. Sec. 1, Ch. 114, L. 1913; re-en. Sec. 11577, R. C. M. 1921.

Collateral References

Hospitals€3. 41 C.J.S. Hospitals § 5.

40 Am. Jur. 2d 857, Hospitals and Asylums, § 10.

(11578) Penalty for violation of act. Every person, persons, corporation or association who with the intent to injure any patient or to injure the practice of any physician or surgeon is found guilty of violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars and not exceeding one thousand dollars, and shall forthwith forfeit its right of exemption from taxation.

History: En. Sec. 2, Ch. 114, L. 1913; re-en. Sec. 11578, R. C. M. 1921.

94-3559. (11556) Diseased animals. It is unlawful for any person having in charge any horse, mule, ass, sheep, hog, or cattle, affected with a contagious disease, to allow such animal to run on any range or to be within any inclosure where they may come in contact with any other animal not so diseased. All animals so affected must be immediately removed to an inside inclosure secure from other animals, or must be herded six miles away from any farm or ranch or from any other stock running at large or being herded. Every person who neglects or refuses to remove, or inclose, or herd as aforesaid, such diseased animals, is guilty of a misdemeanor and liable in damages to the party injured.

History: En. Sec. 1193, Pen. C. 1895; re-en. Sec. 8867, Rev. C. 1907; re-en. Sec. 11556, R. C. M. 1921.

Cross-Reference

Diseased animals not to run at large, sec. 46-237.

Collateral References Animals@=34.

3 C.J.S. Animals § 59. 4 Am. Jur. 2d 282 et seq., Animals, § 32 et seq.

Validity of statutes for the control of diseases of livestock. 65 ALR 525.

Validity, construction, and application of statutes relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 ALR 732.

94-3560. (11297) Disturbing the peace. Every person who willfully and maliciously disturbs the peace of any neighborhood or person by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight or fighting, or who, on the public streets of any town, or upon the public highways, runs any horse race, either for a wager or for amusement, or fires any gun or pistol in such town, or uses any vulgar, profane, or indecent language within the presence or hearing of any women or children, in a loud and boisterous manner, is punishable by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or both.

History: Ap. p. Sec. 117, p. 206, Bannack Stat.; re-en. Sec. 131, p. 299, Cod. Stat. 1871; re-en. Sec. 131, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 42, L. 1883; re-en. Sec. 141, 4th Div. Comp. Stat. 1887; amd. Sec. 1, p. 77, Ex. L. 1887; amd. Sec. 753, Pen. C. 1895; re-en. Sec. 8577, Rev. C. 1907; re-en. Sec. 11297, R. C. M. 1921. Cal. Pen. C. Sec. 415.

Operation and Effect

A person who, in the presence of a large number of women and children, conducts himself in a boisterous, offensive, and disorderly manner, and uses foul and unseemly language, is guilty of a misdemeanor, and is subject to arrest by any officer who is present, even witnout a warrant; but no more force can be used for that purpose than is necessary. Rand v. Butte Electric Ry. Co., 40 M 398, 404, 417, 107 P 87.

Collateral References

Breach of the Peace 1.
11 C.J.S. Breach of the Peace §§ 1-6.
12 Am. Jur. 2d 663 et seq., Breach of Peace and Disorderly Conduct, § 1 et seq.

94-3561. (11042) Disturbing religious meeting. Every person who willfully disturbs or disquiets any assemblage of people met for religious worship by noise, profane discourse, rude or indecent behavior, or by unnecessary noise, either within the place where such meeting is held or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor.

History: En. Sec. 122, p. 207, Bannack Stat.; re-en. Sec. 136, p. 300, Cod. Stat. 1871; re-en. Sec. 136, 4th Div. Rev. Stat. 1879; re-en. Sec. 136, p. 42, L. 1883; re-en. Sec. 146, 4th Div. Comp. Stat. 1887; amd. Sec. 533, Pen. C. 1895; re-en. Sec. 8372, Rev. C. 1907; re-en. Sec. 11042, R. C. M. 1921. Cal. Pen. C. Sec. 302.

Collateral References

Disturbance of Public Assemblage 1. 27 C.J.S. Disturbance of Public Meetings § 1.

ings § 1.
24 Am. Jur. 2d 141 et seq., Disturbing Meetings, § 1 et seq.

94-3562. (11284) Disturbance of public meetings other than religious or political. Every person who, without authority of law, disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in sections 94-1420 and 94-3561, is guilty of a misdemeanor.

History: En. Sec. 740, Pen. C. 1895; re-en. Sec. 8564, Rev. C. 1907; re-en. Sec. 11284, R. C. M. 1921. Cal. Pen. C. Sec. 403.

Collateral References

Disturbance of Public Assemblage...1. 27 C.J.S. Disturbance of Public Meetings § 1.

94-3563. (11316) Disturbance of railway trains—punishment. Any person or persons who shall, upon any railway train or any car used for the conveyance of passengers, disturb the peace and quiet of any of the passengers upon any such railway train or car by loud and tumultuous noises or by offensive conduct, or by using profane, vulgar, or obscene language, or who shall commit an assault upon the person of another, shall,

upon conviction thereof, be fined in a sum not less than twenty-five nor more than three hundred dollars, or by imprisonment in the county jail for not less than ten nor more than ninety days.

History: En. Sec. 1, Ch. 144, L. 1917; re-en. Sec. 11316, R. C. M. 1921.

Collateral References Carriers 522. 13 C.J.S. Carriers §§ 526, 542, 650.

94.3564. (11317) Police power of railroad conductors. Police power is conferred hereby upon every conductor of a railroad company while engaged in operating any passenger train or car lines of railway in the state of Montana, and it shall be the duty of every conductor, while upon duty upon any train or car used for the conveyance of passengers, to arrest any person who shall, in his presence or to his knowledge, be guilty of a disturbance of the peace of other passengers upon such train or car, or who shall commit any assault upon another or who uses profane, obscene, or vulgar language in the presence of women and children, or who conducts himself in a riotous or boisterous manner, and to deliver him or them to a policeman, constable or other peace officer at any station where such officer may be found, and it shall be the duty of such officer to make complaint against such person, and a complaint made upon information and belief of such officer shall be sufficient.

History: En. Sec. 2, Ch. 144, L. 1917; re-en. Sec. 11317, R. C. M. 1921.

Carriers 350.
13 C.J.S. Carriers § 806.

94-3565. (11531) Ditch overflowing on highway. Every person who owns, constructs or uses a ditch or flume, and allows the water therein to flow onto a public highway, or in or upon the property of another, is punishable by a fine not exceeding one hundred dollars (\$100).

History: En. Sec. 1162, Pen. C. 1895; re-en. Sec. 8835, Rev. C. 1907; re-en. Sec. 11531, R. C. M. 1921; amd. Sec. 12-108, Ch. 197, L. 1965.

Collateral References
Waters and Water Courses 266.
93 C.J.S. Waters § 368.

94-3566. (11564) Divorce—advertising to procure, forbidden. Any person who advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed, or circulated, any circular, pamphlet, card, handbill, advertisement, printed paper, book, newspaper, or notice of any kind, with intent to procure, or to aid in procuring any divorce, either in this state or elsewhere, shall be fined not less than twenty-five dollars nor more than one hundred dollars, for such offense, or imprisoned in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment. This act shall not be deemed to apply to the publication of summons in actions for divorce.

History: En. Sec. 1, Ch. 73, L. 1903; re-en. Sec. 8878, Rev. C. 1907; re-en. Sec. 11564, R. C. M. 1921. Cal. Pen. C. Sec. 159a.

Collateral References
Attorney and Client 33.
C.J.S. Attorney and Client 59.

94-3567. (11552) Dogging livestock. Any person, who shall permit or direct any dog owned by them, or in their possession or in the possession of any employer to chase or run any cattle or other livestock, of which he is not the owner or the person in charge, upon the open range, or gov-

ernment lands or away from any watering place upon the open range, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than fifty dollars.

History: En. Sec. 1, Ch. 110, L. 1903; re-en. Sec. 8861, Rev. C. 1907; re-en. Sec. 11552, R. C. M. 1921.

Collateral References

Animals \$\infty 81.

3 C.J.S. Animals §§ 154, 156, 157, 160, 161.

94-3568. (11549) Driving cattle from customary range forbidden. Every person who willfully drives or causes to be driven any cattle, horses, mules, or sheep from their customary range without the permission of the owner thereof is punishable by imprisonment in the county jail not exceeding ninety days, or by fine not exceeding one hundred dollars, or both.

History: En. Sec. 1, Ch. 60, L. 1919; re-en. Sec. 11549, R. C. M. 1921.

This section superseded sections 8858 and 8860, Revised Codes 1907.

Collateral References

Animals \$\sim 14. 3 C.J.S. Animals \$\sim 36, 37.

94-3569. (11555) Driving cattle on railroad. Every person who will-fully drives any animal upon any railroad track with intent to injure the corporation or persons owning the railroad, and such animal is killed or injured thereby, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1191, Pen. C. 1895; re-en. Sec. 8865, Rev. C. 1907; re-en. Sec. 11555, R. C. M. 1921.

Collateral References

Animals \$90. 3 C.J.S. Animals \$\$ 185-187.

Cross-Reference

Driving animals on railroad track, penalty, sec. 72-408.

94-3570. (11566.3) Entertainment defined. The term "entertainment" as used in this act shall include every species and kind of entertainment, including vaudeville shows, motion picture shows, variety shows and all forms of dancing; provided, however, that it shall not include the usual and social forms of dancing participated in solely by bona fide patrons.

History: En. Sec. 1, Ch. 184, L. 1935.

94-3571. (11566.4) Entertainment in establishments licensed to sell beer unlawful. Hereafter it shall be unlawful for any person, firm, company, corporation or association of individuals to conduct or provide or permit to be conducted or provided, any entertainment of any sort or kind at, in or about any beer hall or any room, premises, place or establishment at which beer is sold or licensed to be sold, either under the provisions of the Montana Beer Act or any other law of Montana, now or hereafter in effect, regulating and licensing the sale of beer.

History: En. Sec. 2, Ch. 184, L. 1935.

Cross-Reference

Montana Beer Act, sec. 4-301 et seq.

Collateral References

Intoxicating Liquors 143. 48 C.J.S. Intoxicating Liquors §§ 226-228.

45 Am. Jur. 2d 682, Intoxicating Liquors, § 285.

94-3572. (11566.5) Penalty for violations. Any person or persons, firm, company, corporation, or association violating any of the provisions

of this act shall be deemed guilty of a misdemeanor and upon conviction shall be punishable by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the county jail not to exceed ninety (90) days, or by both such fine and imprisonment, and each day during which any violation of this act shall be permitted to continue, shall constitute a separate offense and shall be subject to like punishment.

History: En. Sec. 3, Ch. 184, L. 1935.

94-3573. (11567) Repealed—Chapter 52, Laws of 1959.

Repeal

Section 94-3573 (Sec. 1, Ch. 66, L. 1907), relating to the showing of motion pictures

depicting crimes, was repealed by Sec. 1, Ch. 52, Laws 1959.

94-3574. (11262) Exhibiting deformities of persons. Every person exhibiting the deformities of another, or his own deformities, for hire, is guilty of a misdemeanor; and every person who shall by any artificial means give to any person the appearance of a deformity, and shall exhibit such person for hire, is guilty of a misdemeanor.

History: En. Sec. 699, Pen. C. 1895; re-en. Sec. 8530, Rev. C. 1907; re-en. Sec. 11262, R. C. M. 1921, Cal. Pen. C. Sec. 400.

Collateral References
Theaters and Shows 9.
86 C.J.S. Theaters and Shows \$58.

94-3575. (11257) Exposing person infected with any contagious disease in a public place. Every person who willfully exposes himself or another infected with any contagious or infectious disease, in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor.

History: En. Sec. 694, Pen. C. 1895; re-en. Sec. 8525, Rev. C. 1907; re-en. Sec. 11257, R. C. M. 1921. Cal. Pen. C. Sec. 394.

94-3576. (10988) False imprisonment, definition and punishment. False imprisonment is the unlawful violation of the personal liberty of another, and is punishable by fine not exceeding five thousand dollars, or by imprisonment in the county jail not more than one year, or both.

History: En. Sec. 48, p. 185, Bannack Stat.; re-en. Sec. 63, p. 280, Cod. Stat. 1871; re-en. Sec. 63, 4th Div. Rev. Stat. 1879; re-en. Sec. 67, 4th Div. Comp. Stat. 1887; amd. Sec. 420, Pen. C. 1895; re-en. Sec. 8324, Rev. C. 1907; re-en. Sec. 10988, R. C. M. 1921. Cal. Pen. C. Sec. 236.

Civil Actions against Sheriff and County Attorney

Where plaintiff compromised an action against the sheriff and his surety for false imprisonment for \$1,000 and executed a release of defendants captioned "release in full of all claims" and reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, a subsequent false imprisonment action against the county at-

torney, who set up the release as a bar, was properly dismissed on motion for judgment on the pleadings, nothing appearing in the release reserving plaintiff's right to proceed against the county attorney. Beedle v. Carolan, 115 M 587, 590, 148 P 2d 559.

Conviction as Affecting Award in Tort

Effect of subsequent conviction in determining actual damages and excessiveness of verdict. Cline v. Tait, 116 M 571, 574, 155 P 2d 752.

Failure To Take Person Promptly before Magistrate

In an action against a sheriff and the surety on his official bond for false imprisonment after arrest without a warrant, based on officer's failure to take plaintiff before a committing magistrate or judicial officer, involving also transportation by federal postal inspectors to neighboring county and interpretation of section 591, Title 18 U. S. C., held, that evidence sufficient to show prima facie case of such imprisonment, but remanded for new trial unless plaintiff consents to reduction of damages. Cline v. Tait, 116 M 571, 574, 155 P 2d 752.

In an action for false imprisonment brought by plaintiff against a sheriff and the surety on his official bond based on unnecessary delay in taking plaintiff before a magistrate, it was necessary that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P 2d 1026.

False Imprisonment Defined

If an arrest and imprisonment have been accomplished without legal process, it is false imprisonment. Grorud v. Lossl,

48 M 274, 283, 136 P 1069.

False imprisonment is an unlawful violation of the personal liberty of another, and is the subject of an action, whether the wrongful act is prompted by malice or not. Grorud v. Lossl, 48 M 274, 136 P 1069.

The gist of the offense of false imprisonment, as defined in this section, is the unlawful detention. Stephens v. Conley, 48 M 352, 364, 138 P 189.

False imprisonment is any unlawful violation of the personal liberty of another, both at common law and under the statute. In re McDonald, 50 M 348, 351, 146 P 942.

The statutory provision, defining the crime of false imprisonment, defines also the civil wrong resulting from it; therefore, in order to make out a case for damages, the plaintiff must allege a violation of his personal liberty, and that such violation was without legal justification. Slifer v. Yorath, 52 M 129, 132, 155 P 1113.

Nature of Crime

False imprisonment is treated as a tort and also as a crime, the definition being the same in either case. The liability of a wrongdoer does not depend primarily upon his mental attitude. Kroeger v. Passmore, 36 M 504, 508, 93 P 805.

Not Existing until Imprisonment Becomes Unlawful

Where, after an officer obtains the custody of another by a privileged arrest, he fails to use due diligence in taking him promptly before a proper court or magistrate, his misconduct makes him liable to the person arrested only for such harm as is caused thereby but not for the arrest or for keeping him in custody prior to such misconduct, false imprisonment as defined by this section not existing until the moment the imprisonment becomes unlawful. Cline v. Tait, 113 M 475, 484, 129 P 2d 89.

Collateral References

False Imprisonment \$\infty\$=43. 35 C.J.S. False Imprisonment § 71. 32 Am. Jur. 2d 165, False Imprisonment, § 119.

94-3577. (11557) Fences, unlawful and dangerous—punishment for. Any person owning any lands in this state, or if the owner is not a resident wherein said land is situated, his managing agent, or if such lands are leased, the lessor, who shall permit any barbed or other wire to remain down, or broken in such condition as to be dangerous to livestock, for the period of thirty days, and the further period of ten days, after personal service upon him of a notice in writing, to repair said wire, shall be deemed guilty of a misdemeanor.

History: En. Sec. 1194, Pen. C. 1895; re-en. Sec. 8868, Rev. C. 1907; re-en. Sec. 11557, R. C. M. 1921.

Collateral References Fences \$\iiins 28 (1). 36A C.J.S. Fences \\$18.

94-3578. (11530) Firing firearms. Every person who willfully shoots or fires off, a gun, pistol, or any firearm, within the limits of any town or city, or of any private inclosure which contains a dwelling house, is punishable by a fine not exceeding twenty-five dollars.

History: En. Secs. 1, 2, p. 46, Ex. L. 1887; amd. Se 1873; re-en. Sec. 185, 4th Div. Rev. Stat. Sec. 8834, Rev 1879; re-en. Sec. 228, 4th Div. Comp. Stat. R. C. M. 1921.

1887; amd. Sec. 1161, Pen. C. 1895; re-en. Sec. 8834, Rev. C. 1907; re-en. Sec. 11530, R. C. M. 1921.

Not Limited to Incorporated Cities and Towns

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State

ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Collateral References

Weapons 515.
94 C.J.S. Weapons §§ 16-18.
56 Am. Jur. 994, Weapons and Firearms. § 7.

94-3578.1. When Montana residents may purchase rifles or shotguns in contiguous states. Residents of Montana may purchase any rifle or rifles and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

History: En. Sec. 1, Ch. 87, L. 1969.

Compiler's Note

The federal Gun Control Act of 1968, referred to in this section, is the act of October 22, 1968, P. L. 90-618.

94-3578.2. When residents of contiguous state may purchase rifles or shotguns in Montana. Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

History: En. Sec. 2, Ch. 87, L. 1969.

94-3579. (11565) Firearms—use of by children under the age of fourteen years prohibited. It shall be unlawful for any parent, guardian, or other person, having the charge or custody of any minor child under the age of fourteen years, to permit such minor child to carry or use any firearms of any description, loaded with powder and lead, in public, except when such child is in the company of such parent or guardian or under the supervision of a qualified firearms safety instructor, who has been duly authorized by such parent or guardian.

History: En. Sec. 1, Ch. 111, L. 1907; Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, R. C. M. 1921; amd. Sec. 1, Ch. 139, L. 1963.

Collateral References Infants©=20. 43 C.J.S. Infants § 16.

94-3580. (11566) Liability of parent or guardian. Any parent, guardian, or other person, violating the provisions of this act shall be guilty of a misdemeanor, and the county attorney, on complaint of any person, must prosecute violations of this act.

History: En. Sec. 2, Ch. 111, L. 1907; Sec. 8880, Rev. C. 1907; re-en. Sec. 11566, R. C. M. 1921.

94-3581. (11561) Flag—desecration of. Any person who, in any manner for exhibition or display, shall place or cause to be placed any word,

figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color, or ensign of the United States of America, or shall expose, or cause to be exposed to public view any such flag, standard, color or ensign upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away or for use for any purpose, any article or substance, being any article of merchandise or receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed, or who shall publicly mutilate, defile, or defy, trample upon, or cast contempt upon, either by words or acts, any such flag, standard, color, or ensign, shall be punished by imprisonment in the county jail for a term not exceeding one year, or by a term in the state penitentiary not exceeding five years, and in addition, a fine not exceeding one thousand dollars.

History: En. Sec. 1, Ch. 63, L. 1905; re-en. Sec. 8875, Rev. C. 1907; amd. Sec. 1, Ch. 12, Ex. L. 1918; re-en. Sec. 11561, R. C. M. 1921.

Collateral References
United States 5½
36A C.J.S. Flags § 2.
35 Am. Jur. 2d 802-804, Flag, §§ 4, 5.

94-3582. (11562) Meaning of term "flag." The words flag, standard, color, or ensign, as used in this act, shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance or represented on any substance, and of any size evidently purporting to be said flag, standard, color, or ensign of the United States of America, or a picture, or representation of either thereof upon which shall be shown the colors, the stars, and the stripes in any number of either thereof, or by which the person seeing the same without deliberation may believe the same to represent the flag, color, standard, or ensign of the United States of America.

History: En. Sec. 2, Ch. 63, L. 1905; re-en. Sec. 8876, Rev. C. 1907; re-en. Sec. 11562, R. C. M. 1921.

94-3583. (11563) Exceptions. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, or stationery for use in correspondence, on any of which shall be printed, painted or placed said flag, disconnected from any advertisement.

History: En. Sec. 3, Ch. 63, L. 1905; re-en. Sec. 8877, Rev. C. 1907; re-en. Sec. 11563, R. C. M. 1921.

94-3584. (11300) Forcible entry and detainer. Every person using or procuring, encouraging or assisting another to use any force or violence in entering upon or detaining any lands or other possessions of another,

except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

History: En. Sec. 756, Pen. C. 1895; re-en. Sec. 8580, Rev. C. 1907; re-en. Sec. 11300, R. C. M. 1921. Cal. Pen. C. Sec. 418.

Collateral References

Forcible Entry and Detainer § 110 et sec.

35 Åm. Jur. 2d 929, 930, Forcible Entry and Detainer, §§ 58, 59.

94-3585. (11522) Fortunetelling, etc., forbidden. Any person or persons who shall advertise or otherwise represent, pretend, or profess to be a fortuneteller, clairvoyant, palmist or astrologist, or who shall, whether designating or representing himself or herself to be such or not, advertise or otherwise represent, pretend or profess to be able to foretell events with reference to any manner of business transaction, courtship, marriage or divorce, or to be able to locate lost or stolen property, friends or relatives, or to locate or find mines, veins, ores, metals or subterranean waters, or who shall pretend or represent himself or herself to be able to tell or read, or predict, the fortune, future, present or past condition of any person or persons by means of fortunetelling, clairvoyancy, palmistry or astrology, or any other means or device or shall pretend or represent himself or herself to be able to, or promise to affect the condition or future, or to bring about or effect the desires or fortune of any person or persons whomsoever, by such or any of such means or methods, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment in the county jail for a period of not less than one nor more than three months, or by both such fine and imprisonment; provided, however, that nothing in this act shall be construed to prohibit or restrict investigation and experiment in the mental science, psychical research, theatrical exhibitions, and other public performance from the public stage.

History: En. Sec. 1, Ch. 102, L. 1909; re-en. Sec. 11522, R. C. M. 1921.

Collateral References
Disorderly Conduct ≈ 1.
27 C.J.S. Disorderly Conduct § 1.

94.3586. (11523) Advertising as a fortuneteller forbidden. Any person who publishes, distributes, circulates, or causes to be published, distributed or circulated any dodgers, circulars, pamphlets or advertisements holding out or advertising any person as a fortuneteller, clairvoyant, palmist or astrologist or as being able to do any of the acts or things prohibited by the preceding section, shall be guilty of a misdemeanor and punished by a fine of not less than ten nor more than one hundred dollars.

History: En. Sec. 2, Ch. 102, L. 1909; re-en. Sec. 11523, R. C. M. 1921.

94-3587. (11524) Advertising as a fortuneteller forbidden—penalty for newspapers accepting advertisement. The proprietor, editor, manager or any other person in charge of any newspaper or printing establishment, publishing or advertising any of the things prohibited by this act shall be guilty of a violation of the provisions of the preceding section.

History: En. Sec. 3, Ch. 102, L. 1909; re-en. Sec. 11524, R. C. M. 1921.

94-3588. (11258) Fraudulent practices to affect the market price. Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

History: En. Sec. 695, Pen. C. 1895; re-en. Sec. 8526, Rev. C. 1907; re-en. Sec. 11258, R. C. M. 1921. Cal. Pen. C. Sec. 395.

Collateral References

Fraud 5-68.

2 C.J.S. Agency § 10; 37 C.J.S. Fraud § 154.

94-3589. (10934) Fraudulent pretenses relative to birth of infant. Every person who fraudulently produces an infant, falsely pretending it to have been born of any parent whose child would be entitled to inherit any real estate, or to receive a share of any personal estate, with intent to intercept the inheritance of any such real estate, or the distribution of any such personal estate, from any person lawfully entitled thereto, is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 283, Pen. C. 1895; re-en. Sec. 8265, Rev. C. 1907; re-en. Sec. 10934, R. C. M. 1921. Cal. Pen. C. Sec. 156.

Collateral References

Descent and Distribution 26. 26A C.J.S. Descent and Distribution 28.

See generally, 32 Am. Jur. 2d 180 et seq., False Pretenses.

94-3590. (10935) Fraudulent pretenses relative to birth of infant—substituting one child for another. Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is punishable by imprisonment in the state prison not exceeding seven years.

History: En. Sec. 284, Pen. C. 1895; re-en. Sec. 8266, Rev. C. 1907; re-en. Sec. 10935, R. C. M. 1921. Cal. Pen. C. Sec. 157.

Collateral References Infants©=20. 43 C.J.S. Infants § 16.

94-3591. (11283.1) Gas masks to be provided employees handling crude oil and gas—requirement. From and after the passage of this act, it shall be unlawful for all oil and gas companies, or refineries, or any person or persons, or corporations, or associations, storing or dealing in crude oil or gas or any highly volatile derivatives of the same, where there is danger of suffocation to an employee, to require such employee to undertake such duty, or perform such work, without being provided with a standard gas mask; and where such duty or work is required of an employee, the employer shall further provide such a standard gas mask in good working condition for immediate use.

History: En. Sec. 1, Ch. 143, L. 1931.

Collateral References
Master and Servant © 14.
56 C.J.S. Master and Servant § 25.

94-3592. (11283.2) Penalties. Any person, firm or corporation failing to provide said safety appliances for the protection of their employees shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00), nor more than

five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 143, L. 1931.

94-3593. (11264) Glanders—animal having, to be killed. Every animal having glanders or farcy shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section is guilty of a misdemeanor.

History: En. Sec. 701, Pen. C. 1895; re-en. Sec. 8532, Rev. C. 1907; re-en. Sec. 11264, R. C. M. 1921. Cal. Pen. C. Sec. 402b.

Collateral References
Animals©=32.
3 C.J.S. Animals § 55.

94-3594. (11263) Glanders—using or exposing animal with glanders. Any person who shall knowingly sell or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule, or other animal having the disease known as glanders, farey, or any contagious disease, is guilty of a misdemeanor.

History: En. Sec. 700, Pen. C. 1895; re-en. Sec. 8531, Rev. C. 1907; re-en. Sec. 11263, R. C. M. 1921. Cal. Pen. C. Sec. 402.

Collateral References
Animals©34.
3 C.J.S. Animals § 59.

94-3595. (10942) Grand juror acting after challenge has been allowed. Every grand juror who, with a knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part, or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

History: En. Sec. 291, Pen. C. 1895; re-en. Sec. 8273, Rev. C. 1907; re-en. Sec. 10942, R. C. M. 1921. Cal. Pen. C. Sec. 164.

Collateral References
Grand Jury 2.18.
38 C.J.S. Grand Juries §§ 28, 30.

94-3596. (11215) Habeas corpus—refusing to issue or obey writ of. Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor.

History: En. Sec. 652, Pen. C. 1895; re-en. Sec. 8463, Rev. C. 1907; re-en. Sec. 11215, R. C. M. 1921. Cal. Pen. C. Sec. 362.

Collateral References
Habeas Corpus \$≈68.
39 C.J.S. Habeas Corpus § 85.
39 Am. Jur. 2d 305, Habeas Corpus,
§ 176, 177.

94-3597. (11216) Reconfining persons discharged upon writ of habeas corpus. Every person who, either solely or as a member of court, knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor.

History: En. Sec. 653, Pen. C. 1895; re-en. Sec. 8464, Rev. C. 1907; re-en. Sec. 11216, R. C. M. 1921. Cal. Pen. C. Sec. 363.

Collateral References
False Imprisonment ≈ 43.
35 C.J.S. False Imprisonment § 71.

94-3598. (11217) Concealing persons entitled to benefit of habeas corpus. Every person having in his custody, or under his restraint or power, any person for whose relief a writ of habeas corpus has been issued, who, with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint, or removes him without the jurisdiction of the court or judge issuing the writ, is guilty of a misdemeanor.

History: En. Sec. 654, Pen. C. 1895; re-en. Sec. 8465, Rev. C. 1907; re-en. Sec. 11217, R. C. M. 1921. Cal. Pen. C. Sec. 364.

94-3599. (11236) Health laws—willful violation of. Every person who willfully violates any of the laws of this state, relating to the preservation of the public health, is, unless a different punishment is prescribed by this code, punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 677, Pen. C. 1895; re-en. Sec. 8485, Rev. C. 1907; re-en. Sec. 11236, R. C. M. 1921. Cal. Pen. C. Sec. 377.

Collateral References
Health 43.
39 C.J.S. Health § 35.
39 Am. Jur. 2d 374, Health, § 37.

94-35-100. (11237) Health laws—neglecting to perform duties under. Every person charged with the performance of any duty under the laws of this state, relating to the preservation of the public health, who willfully neglects or refuses to perform the same, is guilty of a misdemeanor.

History: En. Sec. 678, Pen. C. 1895; re-en. Sec. 8486, Rev. C. 1907; re-en. Sec. 11237, R. C. M. 1921. Cal. Pen. C. Sec. 378.

94-35-101. (11551) Horses, etc.—taking up or restraining, without owner's consent—penalty. Any person, persons, corporation or company, who shall take up or retain in his or their possession, any mare, gelding, colt, foal, filly, mule, jack or jennet, the owner of which cannot with reasonable diligence be found, or of which he is not the owner, without the owner's knowledge or consent, or who shall in any manner restrain from liberty for the purpose or purposes of using or making use of such animal without the knowledge and consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 126, L. 1909; re-en. Sec. 11551, R. C. M. 1921.

Collateral References
Animals \$\infty\$-61.
3 C.J.S. Animals \$\\$ 87, 90-93, 95-99.

94-35-102, 94-35-103. (11314, 11259) Repealed—Chapter 12, Laws of 1953.

Repeal

Sections 94-35-102 and 94-35-103 (Sec. 1, Ch. 84, Laws 1903 and Sec. 696, Pen. C. 1895), relating to the prohibition

against Indians carrying firearms while off the reservation, were repealed by Sec. 1, Ch. 12, Laws 1953.

94-35-104. (11218) Innkeepers and carriers refusing to receive guests. Every person, and every agent or officer of any corporation, carrying on business as an innkeeper, or as a common carrier of passengers, who refuses, without just cause or excuse, to receive and entertain any guest, or to receive or entertain any passenger, is guilty of a misdemeanor.

History: En. Sec. 655, Pen. C. 1895; re-en. Sec. 8466, Rev. C. 1907; re-en. Sec. 11218, R. C. M. 1921. Cal. Pen. C. Sec. 365.

Collateral References

Carriers 21; Innkeepers 15.

13 C.J.S. Carriers § 1008 et seq.; 43

C.J.S. Innkeepers § 27.

14 Am. Jur. 2d 305 et seq., Carriers, § 859 et seq.; 40 Am. Jur. 2d 942 et seq., Hotels, Motels, and Restaurants, § 62 et

94-35-105. (11280) Inspection of mines—penalties—dams and reservoirs, unsafe. Every person who violates any of the provisions of sections 50-101 to 50-114, relating to the inspection of mines, and every person who violates any of the provisions of sections 89-701 to 89-714, relating to dams and reservoirs, is guilty of a misdemeanor.

History: En. Sec. 722, Pen. C. 1895; re-en. Sec. 8563, Rev. C. 1907; re-en. Sec. 11280, R. C. M. 1921.

Collateral References

Mines and Minerals@=93, 95. 58 C.J.S. Mines and Minerals §§ 237,

94-35-106. Intoxicating liquors—penalty for giving or selling to any person under the age of twenty-one years. Any person who shall sell, give away or dispose of intoxicating liquor to any persons under the age of twenty-one (21) years, shall for the first offense be subject to punishment not exceeding five hundred dollars (\$500.00) fine or by imprisonment not to exceed six (6) months in the county jail, or both such fine and imprisonment, and upon conviction for the second and subsequent offenses he shall be subject to punishment by fine of not less than five hundred dollars (\$500.00) nor more than two thousand dollars (\$2,000.00) or by imprisonment in the state penitentiary for not less than one (1) year nor more than five (5) years, or by both such fine and imprisonment. Nothing herein contained shall prevent the furnishing of intoxicating liquor to a person under twenty-one (21) years of age upon any physician's prescription where authorized by the laws of this state or the United States, nor the furnishing of wine for sacramental purposes.

History: En. Sec. 1, Ch. 143, L. 1949.

Compiler's Note

Former section 94-35-106 (Sec. 1, Ch. 122, Laws 1927 as amended Sec. 1, Ch. 124, Laws 1941 and appearing in Revised Codes 1935 as Sec. 11048.1) was held to have been impliedly repealed by Ch. 105, Laws 1933 in State v. Holt, 121 M 459, 194 P 2d 651, and was specifically repealed by Sec. 3, Ch. 143, Laws 1949, and therefore the law set out above (Sec. 1, Ch. 143, Laws 1949) covering the same subject matter has been given the same section number.

Cross-Reference

Sale of alcoholic beverages to minors prohibited, secs. 4-161, 4-413.

Alcoholic Content of Beer

It is not necessary that information or evidence show alcoholic content of beer in order to obtain conviction. State v. Winter, 129 M 207, 285 P 2d 149, 156.

Construction

Under statute, selling to minor is an offense without regard to whether the defendant had a license to sell. State v. Winter, 129 M 207, 285 P 2d 149, 155.

Entrapment

Defense of entrapment would not be available to bar owner in prosecution for selling liquor to minor where it was shown that public officers had given minor money and sent him into bar to purchase the liquor in order to obtain evidence. State v. Parr, 129 M 175, 283 P 2d 1086, 55 ALR 2d 1313. (Dissenting opinion, 129 M 175, 283 P 2d 1086, 1090.)

Evidence of Sale to Other Minors Admissible

Testimony of six boys other than the complaining witness that defendant had sold liquor to each of them in his place of business, all of whom exhibited a complete knowledge of the liquor in the drinks sold to them, was competent, the court properly covering the matter of other sales in its instructions, and more than sufficient to warrant submission of the case to the jury. State v. Gussenhoven, 116 M 350, 351, 152 P 2d 876.

Kind of Liquor Need Not Be Specified

The information in a prosecution charging sale of intoxicating liquor to a minor under this section, need not specify the particular kind of liquor, the allegation that defendant sold certain intoxicating liquor, etc., being sufficient to advise defendant of the charge against him. State v. Baker, 87 M 295, 297, 286 P 1113. See also State v. Clark, 87 M 416, 421, 288 P 186.

Minor Purchaser Not An Accomplice

Minor purchaser is not an accomplice to seller. The purchaser has committed a crime too, but his is knowingly misrepresenting his qualifications for the purpose of obtaining liquor under section 4-413, the penalty for which is found in section 4-439. State v. Paskvan, 131 M 316, 309 P 2d 1019, 1020.

Misrepresentation of Age No Defense

Misrepresentation of age by a minor is not a defense and a seller of intoxicating

beverages must know the age of the purchaser and whatever false representations are made or precautions taken are imaterial where, in fact, the purchaser is under the age of twenty-one. State v. Paskvan, 131 M 316, 309 P 1019, 1021.

Proof of Offense

Corpus delicti may be proved by evidence that the defendant poured minor a drink from a bottle marked "Vodka." State v. Moore, 138 M 379, 357 P 2d 346, 348.

Question of Punishment for Legislature, Not Court

Assignment of error that the punishment imposed for selling intoxicating liquor to a minor under this section is excessive, held properly a matter for consideration by the legislature and not one to be urged on appeal to the supreme court. State v. Gussenhoven, 116 M 350, 351, 152 P 2d 876.

Validity

This section was not impliedly repealed by section 4-330 as amended by chapter 166, Laws of 1951. State v. Winter, 129 M 207, 285 P 2d 149, 156.

Collateral References

Intoxicating Liquors 159 (1), 242. 48 C.J.S. Intoxicating Liquors §§ 259, 380.

45 Am. Jur. 2d 671 et seq., Intoxicating Liquors, § 267 et seq.

Right to hearing before revocation or suspension of liquor license. 35 ALR 2d 1067.

94-35-106.1. Jurisdiction of offenses. In cases of prosecution for first offenses under this act, the justice courts and district courts of the state of Montana shall have concurrent original jurisdiction. In all other cases the district courts of the state of Montana shall have exclusive original jurisdiction for violation of the provisions of this act.

History: En. Sec. 2, Ch. 143, L. 1949.

Validity

This section was not repealed by implication by the amendment of section 4-413 by chapter 71, Laws of 1953. State v. Wild, 130 M 476, 305 P 2d 325, 328.

Any amendment of this section by chapter 71, Laws of 1953 (4-413) is governed by the provisions of section 43-510 which provides that "where a section or a part

of a statute is amended, it is not to be considered as having been repealed and re-enacted but the portions which are not altered are to be considered as having been the law from the time when they were enacted." State v. Wild, 130 M 476, 305 P 2d 325, 328.

There is nothing in chapter 71, Laws of 1953 (4-413) which conflicts with the provisions of this section. State v. Wild, 130 M 476, 305 P 2d 325, 328.

94-35-106.2. Possession of beer or liquor by minor—misdemeanor. Any person who shall not have reached the age of twenty-one (21) years and

who shall have in his or her possession beer or liquor, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 125, L. 1957.

94-35-107. (11048.2) "Intoxicating liquor" defined. When used in this act, or in any other laws of the state relating to intoxicating liquors, the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called containing one half of one per centum, or more of alcohol by volume which are fit for use for beverage purposes; provided, that the foregoing definition shall not extend to dealcoholized wine, nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one half of one per centum of alcohol by volume.

History: En. Sec. 2, Ch. 122, L. 1927. Vodka

While this section does not use the word vodka it does make any beverage containing more than one-half of one per cent of alcohol an intoxicating liquor and court may take judicial notice of commonly accepted and generally understood definition of word "vodka" under section 93-

501-1. State v. Wild, 130 M 476, 305 P 2d 325, 334.

Collateral References

Intoxicating Liquors ≈ 134.
48 C.J.S. Intoxicating Liquors §§ 10, 57,
217.
45 Am. Jur. 2d 488 et seq., Intoxicating Liquors, § 4 et seq.

94-35-108. (11193) Intoxicated physicians, acts of. Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor.

History: En. Sec. 630, Pen. C. 1895; re-en. Sec. 8441, Rev. C. 1907; re-en. Sec. 11193, R. C. M. 1921. Cal. Pen. C. Sec. 346.

Collateral References

Physicians and Surgeons \$210. 70 C.J.S. Physicians and Surgeons \$31.

94-35-109. (11253) Intoxication of engineers, conductors or drivers of locomotives or cars. Every person who is intoxicated while in charge of a locomotive engine, or while as conductor or driver upon any railroad ear or train, whether propelled by steam or otherwise, or while acting as train dispatcher, or as telegraph operator receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.

History: En. Sec. 690, Pen. C. 1895; re-en. Sec. 8521, Rev. C. 1907; re-en. Sec. 11253, R. C. M. 1921. Cal. Pen. C. Sec. 391.

Collateral References
Railroads©=255 (3).
74 C.J.S. Railroads § 458.

94-35-110. (11459) Issuing fictitious bills of lading, etc. Every person being the master, owner, or agent of any vessel, or officer or agent, of any railroad, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of

some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1020, Pen. C. 1895; re-en. Sec. 8731, Rev. C. 1907; re-en. Sec. 11459, R. C. M. 1921. Cal. Pen. C. Sec. 577.

94-35-111. (11460) Issuing fictitious warehouse receipts. Every person carrying on the business of a warehouseman, wharfinger, or other depository of property, who issues any receipt, bill of lading, or other voucher for any merchandise of any description, which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1021, Pen. C. 1895; re-en. Sec. 8732, Rev. C. 1907; re-en. Sec. 11460, R. C. M. 1921. Cal. Pen. C. Sec. 578.

94-35-112. (11461) Erroneous bills of lading or receipts issued in good faith. No person can be convicted of any offense under the last two sections by reason that the contents of any barrel, box, cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher, did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels, or brands upon the outside of such vessel, or package, unless it appears that the accused knew such marks, labels, or brands were untrue

History: En. Sec. 1022, Pen. C. 1895; re-en. Sec. 8733, Rev. C. 1907; re-en. Sec. 11461, R. C. M. 1921. Cal. Pen. C. Sec. 579.

13 C.J.S. Carriers § 514 et seq.; 93 C.J.S. Warehousemen and Safe Depositaries § 88.

Collateral References

Carriers 21; Warehousemen 36.

13 Am. Jur. 2d 776, Carriers, § 271; 56 Am. Jur. 446, Warehouses, § 275.

94-35-113. (11462) Duplicate receipts must be marked "duplicate." Every person mentioned in this chapter, who issues any second or duplicate receipt or voucher, of a kind specified therein, at a time while any former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate" in a plain and legible manner, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1023, Pen. C. 1895; re-en. Sec. 8734, Rev. C. 1907; re-en. Sec. 11462, R. C. M. 1921. Cal. Pen. C. Sec. 580.

94-35-114. (11463) Selling, etc., property received for transportation or storage. Every person mentioned in this chapter who sells, hypothecates or pledges any merchandise for which any bill of lading, receipt,

or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both. The provisions of this section do not apply where the property is demanded or sold under process of law.

History: En. Sec. 1024, Pen. C. 1895; re-en. Sec. 8735, Rev. C. 1907; re-en. Sec. 11463, R. C. M. 1921. Cal. Pen. C. Sec. 581.

94-35-115. (11525) Issuing or circulating paper money. Every person who makes, issues, or puts in circulation, any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense is guilty of a misdemeanor, and for each and every subsequent offense is guilty of felony.

History: En. Sec. 1156, Pen. C. 1895; re-en. Sec. 8829, Rev. C. 1907; re-en. Sec. 11525, R. C. M. 1921. Cal. Pen. C. Sec. 648.

Collateral References
Counterfeiting ≈ 90.
20 C.J.S. Counterfeiting § 9 et seq.
20 Am. Jur. 2d 371, 372, Counterfeiting,
§ 2, 4.

94-35-116. (11528) Leaving gates open. Every person who willfully leaves open a gate, when found closed, leading in or out of any inclosed premises, whether inclosed by a lawful fence or not, is punishable by a fine of not less than ten dollars (\$10.00), nor more than two hundred fifty dollars (\$250.00), or by imprisonment in the county jail not more than three (3) months or by both such fine and imprisonment. This act shall not apply to cities and towns.

History: En. Sec. 10, p. 48, L. 1881; re-en. Sec. 275, 4th Div. Comp. Stat. 1887; amd. Sec. 1159, Pen. C. 1895; re-en. Sec. 8832, Rev. C. 1907; re-en. Sec. 11528, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1923.

Collateral References
Malicious Mischief € 1.
54 C.J.S. Malicious Mischief § 1 et seq.

94-35-117. (11574) Logs—permitting to accumulate along shore forbidden. Any person or corporation who shall run or float saw logs or other timber upon the surface of any navigable lake within the state of Montana, shall not allow such saw logs or other timber to accumulate along the shore, or in any bay, of such navigable lake, in such a way as to obstruct or interfere with free access to any lands lying between high-water mark and low-water mark of such lake, and between high-water mark and the open waters of such lake so as to leave at all times one hundred and fifty feet open water along the shore of such lake, except as provided in the following section.

History: En. Sec. 1, Ch. 147, L. 1911; re-en. Sec. 11574, R. C. M. 1921.

Collateral References
Logs and Logging \$37.
54 C.J.S. Logs and Logging §89.

94-35-118. (11575) Logs—control of logs on navigable lake. Any person or corporation using the waters of any navigable lake for floating logs or timber, shall so dispose of such logs and timber along the shore, or in any bay, of any such navigable lake within the state of Montana, that a

free passageway from high-water mark to the unobstructed surface of such lake shall at all times be left open, and such passageway shall not be less than one hundred and fifty feet in width of open water along the shore of such lake, provided that said logs may be held at a distance of less than one hundred and fifty feet from the shore, where the land abutting the water is owned by the same party owning the logs, but if such logs occupy the water for a distance of six hundred feet or more along the shore of such lake, then and in that event an open channel not less than one hundred feet in width shall be maintained through said logs from the shore, to the open waters of the lake, and one such open channel shall be maintained for each six hundred feet of the shore line that is so obstructed.

History: En. Sec. 2, Ch. 147, L. 1911; re-en. Sec. 11575, R. C. M. 1921.

94-35-119. (11576) Penalty for violation of act. Any person or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars, or imprisonment in the county jail not exceeding a period of thirty days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 147, L. 1911; re-en. Sec. 11576, R. C. M. 1921.

94-35-120. (11233) Maintaining a nuisance a misdemeanor. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty which relates to the removal of a public nuisance, is guilty of a misdemeanor.

History: En. Sec. 674, Pen. C. 1895; re-en. Sec. 8482, Rev. C. 1907; re-en. Sec. 11233, R. C. M. 1921. Cal. Pen. C. Sec. 372.

Collateral References

Nuisance \$\sim 95. 66 C.J.S. Nuisances \\$ 159 et seq. 39 Am. Jur. 285, 451, Nuisances, \\$ 8, 179.

94-35-121. (11213) Making false return or record of marriage. Every person authorized to solemnize any marriage, who willfully makes a false return of any marriage or pretended marriage, to the county clerk, and every person who willfully makes a false record of any marriage return, is punishable as provided in section 94-3539.

History: En. Sec. 650, Pen. C. 1895; re-en. Sec. 8461, Rev. C. 1907; re-en. Sec. 11213, R. C. M. 1921, Cal. Pen. C. Sec. 360.

Collateral References
Marriage©32.
55 C.J.S. Marriage § 33.

94-35-122. (10948) Maliciously procuring warrant. Every person who maliciously and without probable cause procures a search warrant, or warrant of arrest, to be issued and executed, is guilty of a misdemeanor.

History: En. Sec. 297, Pen. C. 1895; re-en. Sec. 8279, Rev. C. 1907; re-en. Sec. 10948, R. C. M. 1921. Cal. Pen. C. Sec. 170.

Collateral References

False Imprisonment 43; Malicious Prosecution 78.

35 C.J.S. False Imprisonment § 71; 54 C.J.S. Malicious Prosecution § 116.

32 Am. Jur. 2d 165, False Imprisonment, § 119; 34 Am. Jur. 801, Malicious Prosecution, § 171.

94-35-123. (3202.1) Repealed—Chapter 314, Laws of 1969.

Repeal

Section 94-35-123 (Sec. 1, Ch. 22, L. 1923; Sec. 1, Ch. 53, L. 1957), making it

unlawful to dispense the mescal button, was repealed by Sec. 14, Ch. 314, Laws 1969.

94.35-124. (3202.2) Penalty for violation. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed five hundred (\$500.00) dollars, or imprisonment in the county jail for a period of not to exceed six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 22, L. 1923.

Compiler's Note

This section provides penalty for violation of repealed section 94-35-123.

94-35-125. (11267) Mining shafts, drifts or cuts to be covered or fenced, when—penalty. Every person who sinks any shaft or runs any drift or cut, or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town, or within three hundred feet of any street, road, or public highway, and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars. The owner of any property, or his agent in charge thereof, or any person in possession of the same shall be deemed to be within the provisions of this act if he permit any such shaft, drift, or cut to remain open, exposed, or unprotected upon his property, or the property in his charge or possession, for a period of more than ten days. Mining, irrigating, and other ditches may be dug or cut to a depth not exceeding ten feet without incurring the penalty of this section.

History: En. Sec. 1, p. 593, Cod. Stat. 1871; re-en. Sec. 255, 4th Div. Comp. Stat. 1887; amd. Sec. 704, Pen. C. 1895; amd. Sec. 1, p. 149, L. 1899; re-en. Sec. 8535, Rev. C. 1907; re-en. Sec. 11267, R. C. M. 1921.

Constitutes Negligence Per Se

Failure to observe the duty imposed by this section, upon the person owning or in possession of property within the limits of a city or town, or within one mile of such limits, on which there is a mining shaft, to place a cover over or a tight fence around the same, is negligence per se. Conway v. Monidah Trust, 47 M 269, 278, 132 P 26. See Nixon v. Montana, Wyoming & Southwestern Ry. Co., 50 M 95, 100, 145 P 8; Kelley v. John R. Daily Co., 56 M 63, 73, 181 P 326.

Liability as to Trespasser

Though a plaintiff infant was a technical trespasser upon defendant's mining claim, into an unguarded shaft in which he fell, the defendant's omission to comply with the requirement imposed upon him by this section rendered him liable for injuries suffered by the plaintiff. Conway v. Monidah Trust, 47 M 269, 279,

132 P 26. See Nixon v. Montana, Wyoming & Southwestern Ry. Co., 50 M 95, 100, 145 P 8.

Not Applicable to a Temporary Sewer Ditch

This section has no application to a ditch or trench temporarily opened for the purpose of laying sewer pipe. McLaughlin v. Bardsen, 50 M 177, 145 P 954.

Not Limited to Incorporated Cities and Towns

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Owner Liable even though He Did Not Sink Shaft

The fact that defendant had not sunk the shaft into which plaintiff fell did not relieve him of liability, this section making it unlawful for the owner or possessor to permit the shaft to remain open or unprotected for a period of more than ten

days, without regard to when or by whom it was sunk. Conway v. Monidah Trust, 47 M 269, 281, 132 P 26.

Within a Mile of the Corporate Limits

Evidence held insufficient to show that the shaft into which plaintiff fell was situated within a mile of the corporate

limits of a city, a fact necessary to be shown to bring defendant within the purview of this section. Conway v. Monidah Trust, 47 M 269, 282, 132 P 26.

Collateral References

Mines and Minerals \$\sim 92. 58 C.J.S. Mines and Minerals § 231.

94-35-126. (11268) Mining—cages in mines must be cased in. It is unlawful for any corporation or person to sink or work, through any vertical shaft where mining cages are used, to a greater depth than three hundred feet, unless said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employees thereof, said cage to be also provided with sheet iron or steel casing not less than one-eighth inch in diameter; doors to be made of the same material shall be hung on hinges, or may be made to slide and shall not be less than five feet high from the bottom of the cage, and said door must be closed when lowering or hoisting the men. Provided, that when such cage is used for sinking only, it need not be equipped with such doors as are hereinbefore provided for. The safety apparatus, whether consisting of eccentrics, springs, or other device, must be securely fastened to the cage, and must be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet of the aforesaid cage must be made of boiler sheet iron, of good quality, of at least three sixteenths of an inch in thickness, and must cover the top of such cage in such manner as to afford the greatest protection to life and limb from anything falling down said shaft. It shall be the duty of the mining inspector and his assistant to see that all cages are kept in compliance with this section and to also see that the safety dogs are kept in good order. Every person or corporation failing to comply with any of the provisions of this section is punishable by a fine of not less than three hundred dollars nor more than one thousand dollars.

History: Ap. p. Sec. 705, Pen. C. 1895; amd. Sec. 1, p. 245, L. 1897; en. Sec. 1, Ch. 60, L. 1903; re-en. Sec. 8536, Rev. C. 1907; re-en. Sec. 11268, R. C. M. 1921.

Effect of Failure To Comply on the Ordinary Rules and Standards of Negligence

Where the legislature has declared, as in the above section, that the master shall adopt certain precautions to guard against danger to his employees, the common-law rule of reasonable care is no longer the measure of his duty, and any failure on his part to observe the required precautions is such a breach of duty as will render him liable to the servant for any der him liable to the servant for any injury caused to the latter by his disobedience. Monson v. La France Copper Co., 39 M 50, 60, 101 P 243. See Westlake v. Keating Gold Min. Co., 48 M 120, 128, 136 P 38; Ball Ranch Co. v. Hendrickson, 50 M 220, 226, 146 P 278; Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

The failure of a mining company to equip the cage upon which plaintiff was

being hoisted with doors, as required by this section, did not deprive said company of the right to interpose the defense of assumption of risk or contributory negligence. Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 40 M 508, 527, 107 P 499.

The duty imposed on the employer by this statute is a continuing one, and where the employee has no choice, as where he is in a deep mining shaft and has no means of egress other than that provided by the employer, and must use a mining cage from which the doors are missing, contrary to the provisions of this section, he will be presumed to have submitted to its use from necessity, and, therefore, not to have assumed the attendant risk. Monson v. La France Copper Co., 43 M 65, 71, 114 P 778.

In an action in which damages were sought to be recovered for the death of a mine employee, charged to have been due to legal negligence of defendant in attempting to hoist him to the surface of

the mine in a cage, the doors of which had not been closed as provided in this section, defendant was not, because of the fact that the statute makes omission in this respect punishable by a fine, limited to those defenses available in a criminal action, but could plead any of the defenses ordinarily interposed in negligence cases. Maronen v. Anaconda Copper Min. Co., 48 M 249, 261, 136 P 968.

Inadmissible Evidence on a Prosecution under This Section

In a prosecution for the violation of this section, evidence that the devices or cages therein referred to would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide. State v. Anaconda Copper Min. Co., 23 M 498, 503, 59 P 854.

"Men" as Used Herein

The word "men" applies to the hoisting or lowering of one man, as well as to the men in a body when going on or off shift. Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 40 M 508, 520, 107 P 499.

Nature of Section

This section is penal statute, and its violation is a crime; but the fact that a penalty is attached for its violation does not render the violator immune from civil liability under section 93-2810. Maronen v. Anaconda Copper Min. Co., 48 M 249, 258, 136 P 968.

Operation and Effect

In an action to recover damages for death of an employee by reason of having fallen out of a cage alleged to be due to defendant's negligence in failing to see that the doors of the cage were in place, the evidence must show that the alleged negligence was the proximate cause of the injury. Monson v. La France Copper Co., 39 M 50, 61, 101 P 243.

Plaintiff, whose limb was crushed by reason of an unguarded door, cannot be said to have waived the absence of the door by a request that it be removed, made by him some three months before the accident, where, between the time it was removed and the date of the injury, he had left the defendant's service, and where in the meantime much sinking had been done, during which operations there was no necessity for a door. Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 40 M 508, 522, 107 P 499.

This section does not create any right of action or destroy any defense available at the time of its enactment. Maronen v. Anaconda Copper Min. Co., 48 M 249, 258, 136 P 968.

This section does not make it obligatory upon mine operators to employ a station-tender at each station to open and close the cage doors, where only a small number of miners is engaged in active mining, and does not prohibit, either expressly or impliedly, the imposition of the duty of opening and closing them upon a miner, provided he be capable, understands the method pursued in fulfilling the additional requirement, and is not encumbered with work which would interfere with its discharge. Maronen v. Anaconda Copper Min. Co., 48 M 249, 266, 136 P 968.

Proper Exercise of the Police Power

This section is a proper exercise of the police power of the state; its manifest design being "to guard against the dangers incident to lowering and elevating men in deep mining shafts." State v. Anaconda Copper Min. Co., 23 M 498, 503, 59 P 854; Monson v. La France Copper Co., 39 M 50, 59, 101 P 243.

"Sinking" Defined

The term "sinking" has no application to the cutting of stations, even though the latter operation be a necessary part of the process of sinking. Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 40 M 508, 520, 107 P 499.

94-35-127. (11269) Mining—stoping near shaft. It is unlawful for any corporation or person operating any mine in this state worked through a vertical or incline shaft to stope within a less distance than twenty-five feet of the said shaft, when other work is being carried on below said stoping.

History: En. Sec. 1, Ch. 82, L. 1903; re-en. Sec. 8537, Rev. C. 1907; re-en. Sec. 11269, R. C. M. 1921.

94.35-128. (11270) Mining—running cage at excessive speed. It is unlawful for any person or corporation operating any mine in this state worked through a vertical or incline shaft, where a cage or other device is used for the purpose of hoisting or lowering men, to run such cage when

men are upon the same at a greater rate of speed than eight hundred feet per minute.

History: En. Sec. 2, Ch. 82, L. 1903; re-en. Sec. 8538, Rev. C. 1907; re-en. Sec. 11270, R. C. M. 1921.

94-35-129. (11271) Mining—maintaining buildings near mouth of shaft. It is unlawful for any person, company, or corporation to erect or maintain any building or inclosure used for a blacksmith shop or drying room within a distance of fifty feet of the mouth of any tunnel or shaft, unless the same shall be fireproof in its construction.

History: En. Sec. 3, Ch. 82, L. 1903; re-en. Sec. 8539, Rev. C. 1907; re-en. Sec. 11271, R. C. M. 1921.

94-35-130. (11272) Penalties. The penalty for violating the provisions of any of the preceding sections is the same as provided in section 94-35-126, provided, that when it shall appear that any engineer has violated the express order of his employer in running his engine at a greater speed than eight hundred feet per minute, the engineer alone shall be subject to prosecution, and to the fine imposed by the provisions of this act.

History: En. Sec. 4, Ch. 82, L. 1903; re-en. Sec. 8540, Rev. C. 1907; re-en. Sec. 11272, R. C. M. 1921.

94-35-131. (11580) Mining—penalty for obstructing mining shafts, etc. Any person who shall, in any manner, cast, throw, place in, or cause to enter, fill, obstruct, or partially fill or obstruct, any drift, shaft, tunnel, open cut, or any other opening in or upon any mining claim or mining property owned, possessed, or lawfully held or claimed by another under the laws of the state of Montana, or under the laws of the United States, or otherwise, any debris, stone, rock, earth, timber, brush, carcass of any dead animal, machinery, appliances, or any other material or thing whatsoever, without the written consent of the person owning or lawfully possessing such mining property or claim, or who shall, in any manner, cause such drift, shaft, tunnel, open cut, or other opening to cave in or otherwise be rendered of less value for use, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail of not less than thirty days nor more than six months, or by both such fine and imprisonment. A conviction under the provisions of this act shall not affect any right to recover damages for the doing of anything herein forbidden, or the commission of any trespass upon a mining claim or property of another.

History: En. Sec. 1, Ch. 123, L. 1921; re-en. Sec. 11580, R. C. M. 1921.

Collateral References
Mines and Minerals 592.
58 C.J.S. Mines and Minerals § 229.

94-35-132. (11273) Mining—protection of underground miners—escapement shaft. It is the duty of any person, company, or corporation who shall have sunk on any mine a vertical or incline to a greater depth than one hundred feet, and who shall have the top of such shaft or hoisting

opening covered or inclosed by a shaft or building which is not fireproof, and who shall have drifted on or along the vein or veins thereof a distance of two hundred feet or more, after crosscutting to the same, and shall have commenced to stope, to provide and maintain to the hoisting shaft or the opening through which men are let into or out of the mine and the ore is extracted, a second escapement shaft, raise, or opening, or an underground opening or communication between every such mine and some other contiguous mine; provided, that in case such contiguous mine belongs to a different person, company, or corporation, the right to use the outlet through such contiguous mine in all cases when necessary, or in cases of accident, must be secured and kept in force. Where such an escapement shaft or opening shall not be in existence at the time that stoping is commenced, work upon such an escapement shaft or opening must be commenced as soon as stoping begins and be diligently prosecuted until the same is completed, and said escapement shaft, raise, or opening shall be continued to and connected with the lowest workings in the mine. The exit, escapement shaft, raise, or opening provided for in the foregoing paragraphs must be of sufficient size as to afford an easy passageway, and if it be a raise, or shaft, must be provided with good and substantial ladders from the deepest workings to the surface. Whenever the exit or outlet herein provided for is not in a direct or continuous course, signboards, plainly marked, showing the direction to be taken, must be placed at each departure from the continuous course.

History: En. Sec. 1, p. 66, L. 1897; re-en. Sec. 8541, Rev. C. 1907; re-en. Sec. 11273, R. C. M. 1921.

94-35-133. (11274) Mining—to what mines applicable. This act shall apply only to quartz mines in which nine or more men are employed underground, and shall not apply to mines not actually extracting ores, by stoping, or to mines in which the shaft or hoisting opening, or hauling way, is not covered by a shafthouse, and has no building structure within thirty feet of the shaft or opening, nor to mines in which the hoisting shaft or opening shall be covered by or inclosed in a fireproof shaft or building.

History: En. Sec. 2, p. 67, L. 1897; re-en. Sec. 8542, Rev. C. 1907; re-en. Sec. 11274, R. C. M. 1921.

94-35-134. (11275) Penalty. The penalty for violating any of the provisions of the preceding section is the same as provided in section 94-35-126.

History: En. Sec. 3, p. 67, L. 1897; re-en. Sec. 8543, Rev. C. 1907; re-en. Sec. 11275, R. C. M. 1921.

94-35-135, 94-35-136. (11566.1, 11566.2) Repealed—Chapter 50, Laws of 1947.

94-35-137. (11046) Minors, admission of, to place of prostitution. Any proprietor, keeper, manager, conductor, or person having the control of any house of prostitution, or any house or room resorted to for the purpose of prostitution, who shall admit or keep any minor of either sex therein, or any parent or guardian of any such minor who shall admit or keep such

minor, or sanction or connive at the admission or keeping thereof into or in any such house or room, shall be guilty of a misdemeanor.

History: En. Sec. 539, Pen. C. 1895; re-en. Sec. 8378, Rev. C. 1907; re-en. Sec. 11046, R. C. M. 1921. Cal. Pen. C. Sec. 309.

Cross-Reference

Enticing to place of prostitution, penalty, sec. 94-3610.

Collateral References
Infants 20.
43 C.J.S. Infants § 16.
42 Am. Jur. 2d 21, Infants, § 16.

94-35-138. (11039.1) Minors under sixteen — permitting to frequent dance halls. Every owner, proprietor, manager or employee of a public dance hall or a place where public dances are held, who encourages or permits a minor under the age of sixteen years to be, remain in, or frequent such hall or place while a public dance is in progress, without being accompanied by his or her parent or legal guardian, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 49, L. 1927.

Collateral References
Infants©20.
43 C.J.S. Infants § 16.
42 Am. Jur. 2d 21, Infants, § 16.

94-35-139. (11251) Obstructing attempts to extinguish fires. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to, or interferes with, the lawful efforts of any fireman or any company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

History: En. Sec. 687, Pen. C. 1895; re-en. Sec. 8519, Rev. C. 1907; re-en. Sec. 11251, R. C. M. 1921, Cal. Pen. C. Sec. 385.

Collateral References
Fires 2.
36A C.J.S. Fires §§ 2-5, 9.
35 Am. Jur. 2d 585, Fires, § 6.

94-35-140. (11529) Obstructing ford near ferry. Every person who owns and conducts a ferry, and who obstructs any ford at or near his ferry, or excludes or prevents the public from the free use of such ford, and who in any manner obstructs such ford, is punishable by a fine not exceeding one hundred dollars.

History: Ap. p. Sec. 184, p. 312, Cod. Stat. 1871; re-en. Sec. 184, 4th Div. Rev. Stat. 1879; re-en. Sec. 227, 4th Div. Comp. Stat. 1887; en. Sec. 1160, Pen. C. 1895; re-en. Sec. 8833, Rev. C. 1907; re-en. Sec. 11529, R. C. M. 1921.

Collateral References Ferries ≈ 32. 36A C.J.S. Ferries §§ 2, 28.

94-35-141. (10950) Omission of duty by public officer. Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, or any neglect of duty, where no special provision has been made for the punishment of such delinquency, is punishable as a misdemeanor.

History: En. Sec. 299, Pen. C. 1895; re-en. Sec. 8281, Rev. C. 1907; re-en. Sec. 10950, R. C. M. 1921. Cal. Pen. C. Sec. 176.

Collateral References
Officers©=121.
67 C.J.S. Officers § 133.
43 Am. Jur. 129, Public Officers, § 329.

94-35-142. (10951) Offense for which no penalty is prescribed. When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

History: En. Sec. 300, Pen. C. 1895; re-en. Sec. 8282, Rev. C. 1907; re-en. Sec. 10951, R. C. M. 1921. Cal. Pen. C. Sec. 177.

Collateral References

Criminal Law 21208 (1) 24B C.J.S. Criminal Law §§ 1980, 1986. 21 Am. Jur. 2d 542 et seq., Criminal Law, § 576 et seq.

94-35-143. (10952) Oppression and injury by an officer. Every officer who, under color of authority, oppresses, wrongs, or injures any person, is guilty of a misdemeanor.

History: En. Sec. 301, Pen. C. 1895; re-en. Sec. 8283, Rev. C. 1907; re-en. Sec. 10952, R. C. M. 1921.

Collateral References
Officers©=121.
67 C.J.S. Officers § 133.

94-35-144. (11526) Officers of fire departments issuing false certificates of exemption. Every officer of a fire department who willfully issues, or causes to be issued, any certificate of exemption to a person not entitled thereto, is guilty of a misdemeanor.

History: En. Sec. 1157, Pen. C. 1895; re-en. Sec. 8830, Rev. C. 1907; re-en. Sec. 11526, R. C. M. 1921. Cal. Pen. C. Sec. 649.

Collateral References

Municipal Corporations 549. Municipal Corporations 549.

94-35-145. (11248) Oleomargarine. Every person who manufactures for sale, or offers or exposes for sale, or has in his possession with intent to sell any article or substance in resemblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, or into which the oil or fat of animals not produced from milk enters as a component part, or into which the oil or fat of animals not produced from milk has been introduced to take the place of cream, must distinctly stamp, brand, or mark in some conspicuous place upon every firkin, tub, or package of such article or substance, in plain letters not less than one-fourth inch square each, the word "oleomargarine," or the words "imitation cheese," as the case may be; and in the retail sale of such article or substance, in parcels or otherwise, the seller must deliver to the purchaser therewith a printed label, bearing the plainly printed words "oleomargarine" or "imitation cheese," plainly marked as aforesaid.

History: En. Sec. 684, Pen. C. 1895; re-en. Sec. 8516, Rev. C. 1907; re-en. Sec. 11248, R. C. M. 1921, Cal. Pen. C. Sec. 383a.

Collateral References

Food = 13. 36A C.J.S. Food §§ 22, 24. 35 Am. Jur. 2d 838, Food, § 41. Construction of statute in relation to marking or branding of containers. 35 ALR 782.

Constitutionality of statute in relation to oleomargarine or other substitute for butter. 53 ALR 474.

94-35-146. (11249) Oleomargarine. Every person dealing in the article or substance described in the next preceding section, and every hotel, restaurant, or boardinghouse keeper using such article or substance in his business must continuously and conspicuously keep posted up in not less than three exposed positions, in and about his place of business, a printed

notice in the following words: "oleomargarine" or "imitation cheese" "sold (or used) here," which notice must be plainly printed with letters not less than two inches square each, and must, upon furnishing the article or substance to his customers or guests, if inquiry is made, distinctly inform each of them that the article furnished is not butter or cheese, the genuine product of the dairy, but is oleomargarine or imitation cheese.

History: En. Sec. 685, Pen. C. 1895; re-en. Sec. 8517, Rev. C. 1907; re-en. Sec. 11249, R. C. M. 1921.

Collateral References Food \$\simes 8. 36A C.J.S. Food \$ 18. 35 Am. Jur. 2d 839, Food, \$ 42.

94-35-147. (11250) Penalty. Every person and every officer or agent of any corporation who violates any of the provisions of the last two preceding sections is punishable by imprisonment in the county jail not exceeding one month, or by fine not exceeding one hundred dollars.

History: En. Sec. 686, Pen. C. 1895; re-en. Sec. 8518, Rev. C. 1907; re-en. Sec. 11250, R. C. M. 1921.

94-35-148. (11045) Repealed—Chapter 314, Laws of 1969.

Repeal

Section 94-35-148 (Sec. 1, p. 65, L. 1881; Sec. 538, Pen. C. 1895), relating to

the keeping of or resorting to place where opium is used or sold, was repealed by Sec. 14, Ch. 314, Laws 1969.

94-35-149. (10926) Personating officer. Any person or persons who shall in this state, without due authority, exercise, or attempt to exercise, the functions of or hold himself or themselves out to anyone as a deputy sheriff, marshal, or policeman, constable, or peace officer, shall be deemed guilty of a felony, and, upon conviction thereof, shall, in the discretion of the court or jury, be imprisoned in the penitentiary for any period not less than one year nor more than three years, to which may be added a fine of not less than one hundred dollars nor more than five hundred dollars, together with the costs of prosecution.

History: En. Sec. 4600, Pol. C. 1895; re-en. Sec. 3126, Rev. C. 1907; re-en. Sec. 10926, R. C. M. 1921.

Collateral References
False Personation ≈1.
35 C.J.S. False Personation §§ 1-4.
32 Am. Jur. 2d 169, False Personation,
3.

94-35-150. (10927) Penalty for violation of act. Any person, company, or association, who shall violate any of the provisions of this act, shall, upon conviction, be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than one year nor more than three years.

History: En. Sec. 4601, Pol. C. 1895; re-en. Sec. 3127, Rev. C. 1907; re-en. Sec. 10927, R. C. M. 1921.

Collateral References
False Personation € 7.
35 C.J.S. False Personation § 4 et seq.

94-35-151. (11234) Pesthouse—establishing or keeping within cities, towns, etc. Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town, or village, any pesthouse, hospital, or place for persons affected with contagious or infectious diseases, is guilty of a misdemeanor.

History: En. Sec. 675, Pen. C. 1895; re-en. Sec. 8483, Rev. C. 1907; re-en. Sec. 11234, R. C. M. 1921. Cal. Pen. C. Sec. 373.

Not Limited to Incorporated Cities and Towns

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Collateral References

Health \$37. 39 C.J.S. Health §§ 30, 31.

94-35-152 to **94-35-152.18**. (11572)

Repeal

Sections 94-35-152 to 94-35-152.18 (Sec. 1, Ch. 32, L. 1911), relating to labeling of

(11572) Repealed—Chapter 199, Laws of 1965.

prison-made goods and prison industries, were repealed by Sec. 101, Ch. 199, Laws 1965.

94-35-153 to 94-35-162. (11573 to 11573.9) Repealed—Chapter 162, Laws of 1953.

Repeal

Sections 94-35-153 to 94-35-162 (Sec. 2, Ch. 32, Laws 1911; Secs. 1 to 9, Ch. 172,

Laws 1933; amd. Sec. 1, Ch. 9, Ex. L. 1933), relating to prison-made goods, were repealed by Sec. 19, Ch. 162, Laws 1953.

94-35-163. (11293) Prize fights. Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention (without deadly weapons) either as principal, aid, second, umpire, surgeon or otherwise, is punishable by imprisonment in the state prison not exceeding two years.

History: Ap. p. Sec. 1, p. 108, L. 1885; re-en. Sec. 147, 4th Div. Comp. Stat. 1887; en. Sec. 749, Pen. C. 1895; re-en. Sec. 8573, Rev. C. 1907; re-en. Sec. 11293, R. C. M. 1921. Cal. Pen. C. Sec. 412.

Collateral References

Prize Fighting 1.
72 C.J.S. Prize Fighting § 1 et seq.

41 Am. Jur. 953, et seq., Prize Fighting, § 1 et seq.

94-35-164. (11294) Persons present at prize fights. Every person willfully present as a spectator at any fight or contention mentioned in the preceding section is guilty of a misdemeanor.

History: En. Sec. 750, Pen. C. 1895; re-en. Sec. 8574, Rev. C. 1907; re-en. Sec. 11294, R. C. M. 1921. Cal. Pen. C. Sec. 413.

94-35-165. (11295) Leaving the state to engage in prize fights. Every person who leaves this state with intent to evade any of the provisions of the last two sections, and to commit any act out of this state, such as is prohibited by them, and who does any act which would be punishable under these provisions if committed within this state, is punishable in the same manner as he would have been in case such act had been committed within this state.

History: En. Sec. 751, Pen. C. 1895; re-en. Sec. 8575, Rev. C. 1907; re-en. Sec. 11295, R. C. M. 1921. Cal. Pen. C. Sec. 414.

94-35-166. (10917) Public administrator, neglect or violation of duty by. Every person holding the office of public administrator, who willfully refuses or neglects to perform the duties thereof, or who violates any provision of law relating to his duties or the duties of his office, for which

some other punishment is not prescribed, is punishable by fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding two years, or both.

History: En. Sec. 271, Pen. C. 1895; re-en. Sec. 8252, Rev. C. 1907; re-en. Sec. 10917, R. C. M. 1921. Cal. Pen. C. Sec. 143.

Collateral References

Executors and Administrators 24.

33 C.J.S. Executors and Administrators § 43; 34 C.J.S. Executors and Administrators §§ 1050-1053.

31 Am. Jur. 2d 274, Executors and Administrators, § 647.

94-35-167. (11231) Public nuisances defined. Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street, or highway. is a public nuisance.

History: En. Sec. 672, Pen. C. 1895; re-en. Sec. 8480, Rev. C. 1907; re-en. Sec. 11231, R. C. M. 1921. Cal. Pen. C. Sec. 370.

Collateral References

Nuisance 59. 66 C.J.S. Nuisances § 2. 39 Am. Jur. 284-287, Nuisances, §§ 7, 8.

(11232) Unequal damage. Any act which affects an entire community or neighborhood or any considerable number of persons, as specified in the last section, is no less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

History: En. Sec. 673, Pen. C. 1895; re-en. Sec. 8481, Rev. C. 1907; re-en. Sec. 11232, R. C. M. 1921. Cal. Pen. C. Sec. 371.

94-35-169. (10928) Public officers—resisting in the discharge of their duties. Every person who willfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 277, Pen. C. 1895; re-en. Sec. 8259, Rev. C. 1907; re-en. Sec. 10928, R. C. M. 1921. Cal. Pen. C. Sec 148.

Unlawful Arrest

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest could not be justified as for violation of this section since plaintiff had right to possession of the check. Harrer v. Montgomery Ward & Co., 124 M 295, 221 P 2d 428, 435.

Collateral References

Obstructing Justice 7, 9, 21. 67 C.J.S. Obstructing Justice § 5, 6, 22. 39 Am. Jur. 506 et seq., Obstructing Justice, § 8 et seq.

Dispute over custody as affecting charge of obstructing or resisting arrest. 3 ALR

What constitutes offense of obstructing or resisting officer. 48 ALR 746.

94-35-170. (10929) Public officers—assault, etc., by, under color of authority. Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 278, Pen. C. 1895; re-en. Sec. 8260, Rev. C. 1907; re-en. Sec. 10929, R. C. M. 1921. Cal. Pen. C. Sec. 149.

Collateral References
Assault and Battery 64.
6 C.J.S. Assault and Battery § 97.

94-35-171. (11240) Putting extraneous substances in packages of goods usually sold by weight with intent to increase weight. Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay or other goods usually sold in bags, bales, boxes, barrels or packages, by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel, or package, with intent thereby to sell the goods therein, or to enable another to sell the same, for an increased weight, is punishable by fine of not less than twenty-five dollars for each offense.

History: En. Sec. 681, Pen. C. 1895; re-en. Sec. 8489, Rev. C. 1907; re-en. Sec. 11240, R. C. M. 1921. Cal. Pen. C. Sec. 381.

Collateral References
Adulteration 4.
2 C.J.S. Adulteration §§ 5-10.

94-35-172. (11243) Sale of diseased carcasses without inspection forbidden. It shall be unlawful for any person to sell or offer for sale the carcass or any part of the carcass of an animal having actinomycosis (big jaw), tuberculosis, or any other infectious or contagious disease unless the same shall have been inspected and passed by a representative of the livestock sanitary board or the United States bureau of animal industry.

History: En. Sec. 1, p. 163, L. 1901; re-en. Sec. 8492, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1917; re-en. Sec. 11243, R. C. M. 1921.

Cross-Reference

Unsanitarily slaughtered or handled carcasses not to be sold, sec. 46-216.

94-35-173. (11244) Penalty for violation of act. Any person guilty of violating this act shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment.

History: En. Sec. 2, Ch. 39, L. 1917; re-en. Sec. 11244, R. C. M. 1921.

Collateral References Food €== 23. 36A C.J.S. Food § 49.

94-35-174. (11278) Railroads—animals killed by. Except as otherwise provided, every person who violates any of the provisions of sections 72-401 to 72-506, relating to livestock killed or injured by railroads, is guilty of a misdemeanor.

History: En. Sec. 720, Pen. C. 1895; re-en. Sec. 8561, Rev. C. 1907; re-en. Sec. 11278, R. C. M. 1921.

Collateral References
Animals©=245.
3 C.J.S. Animals §§ 236, 237, 241, 242,

94-35-175. (11279) Violating railroad regulations. Every person who violates any of the provisions of section 72-219 relating to the regulations of railroad companies must, on conviction of any of the offenses therein named, be punished by a fine not less than five hundred nor more than ten thousand dollars.

History: En. Sec. 721, Pen. C. 1895; re-en. Sec. 8562, Rev. C. 1907; re-en. Sec. 11279, R. C. M. 1921.

NOTE.—Section 72-219 provides a minimum penalty for violation of that section

which is different from the minimum penalty herein provided.

Collateral References

Railroads 255 (13). 74 C.J.S. Railroads § 464.

94-35-176. (11254) Repealed—Chapter 39, Laws of 1969.

Repeal

Section 94-35-176 (Sec. 691, Pen. C. 1895), prohibiting placement or running

of freight car in rear of passenger cars in making up or running a train, was repealed by Sec. 1, Ch. 39, Laws 1969.

94-35-177. (10930) Refusing to aid officers in arrest, etc. Every male person above the age of eighteen years, who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars.

History: En. Sec. 133, p. 210, Bannack Stat.; re-en. Sec. 150, p. 304, Cod. Stat. 1871; re-en. Sec. 150, 4th Div. Rev. Stat. 1879; re-en. Sec. 175, 4th Div. Comp. Stat. 1887; amd. Sec. 279, Pen. C. 1895; re-en. Sec. 8261, Rev. C. 1907; re-en. Sec. 10930, R. C. M. 1921, Cal. Pen. C. Sec. 150.

County Not Liable

Construed with other sections to the effect that a county is not liable for compensating members of a sheriff's posse comitatus. Sears v. Gallatin County, 20 M 462, 52 P 204.

Members of Posse Not Officers

Members of the sheriff's posse are not

officers, nor do they tender official services. Sears v. Gallatin County, 20 M 462, 52 P 204.

State May Impose Duty

The state, in consideration of its protection extended, may impose upon its inhabitants the duty of rendering it services, at least in an emergency requiring the apprehension of a criminal, or one charged with the commission of a public offense. Sears v. Gallatin County, 20 M 462, 52 P 204.

Collateral References
Obstructing Justice € 1.
67 C.J.S. Obstructing Justice § 4.

94-35-178. (11298) Refusing to disperse upon lawful command. If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

History: En. Sec. 118, p. 206, Bannack Stat.; re-en. Sec. 132, p. 299, Cod. Stat. 1871; re-en. Sec. 132, 4th Div. Rev. Stat. 1879; re-en. Sec. 142, 4th Div. Comp. Stat. 1887; amd. Sec. 754, Pen. C. 1895; re-en. Sec. 8578, Rev. C. 1907; re-en. Sec. 11298, R. C. M. 1921. Cal. Pen. C. Sec. 416.

Collateral References

Unlawful Assembly \$\infty\$ 7. 91 C.J.S. Unlawful Assembly \$ 7. 46 Am. Jur. 128, Riots and Unlawful Assembly, \$ 4.

94-35-179. (11532) Removing skin from animal. Every person who removes the skin from an animal and leaves the carcass within one quarter of

a mile of a dwelling, is punishable by a fine not exceeding twenty-five dollars.

History: En. Sec. 1168, Pen. C. 1895; re-en. Sec. 8841, Rev. C. 1907; re-en. Sec. 11532, R. C. M. 1921. Collateral References
Game © 7.
38 C.J.S. Game §§ 11-14.

94-35-180. (11301) Returning to take possession of lands after being removed by legal proceedings. Every person who has been removed from any lands by process of law or who has been removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal, or officer, and who afterwards returns to settle, reside upon, or take possession of such lands is guilty of a misdemeanor.

History: En. Sec. 757, Pen. C. 1895; re-en. Sec. 8581, Rev. C. 1907; re-en. Sec. 11301, R. C. M. 1921. Cal. Pen. C. Sec. 419.

Cross-Reference

Re-entry as contempt, sec. 93-9802.

Collateral References

Obstructing Justice ⊕3, 9. 67 C.J.S. Obstructing Justice §§ 2, 3.

94-35-181. (11285) Riot defined. Any use of force or violence, disturbing the public peace, or any threats to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

History: En. Sec. 741, Pen. C. 1895; re-en. Sec. 8565, Rev. C. 1907; re-en. Sec. 11285, R. C. M. 1921, Cal. Pen. C. Sec. 404.

Unlawful parade as riot. 9 ALR 552. What constitutes riot within criminal law. 49 ALR 1135. Civil rights activities, anticipatory re-

Collateral References

Riot \$ 1.
77 C.J.S. Riot § 1 et seq.
46 Am. Jur. 127 et seq., Riots and Unlawful Assembly, § 3 et seq.

Civil rights activities, anticipatory relief in federal courts against state criminal prosecutions growing out of. 8 ALR 3d 301.

94-35-182. (11286) Riot, punishment of. Any person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by a fine not exceeding two thousand dollars, or both.

History: En. Sec. 742, Pen. C. 1895; re-en. Sec. 8566, Rev. C. 1907; re-en. Sec. 11286, R. C. M. 1921. Cal. Pen. C. Sec. 405.

Collateral References

Riot€ 8. 77 C.J.S. Riot § 28.

94-35-183. (11287) Rout defined. Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

History: En. Sec. 743, Pen. C. 1895; re-en. Sec. 8567, Rev. C. 1907; re-en. Sec. 11287, R. C. M. 1921. Cal. Pen. C. Sec. 406.

Collateral References

Unlawful Assembly . 1.
91 C.J.S. Unlawful Assembly § 2.
46 Am. Jur. 129, Riots and Unlawful Assembly, § 7.

94-35-184. (11281) Sale or manufacture of Maxim silencers and various explosives for wrongful use a felony. Any person who shall make, manufacture, compound, buy, sell, give away, offer for sale or to give away, transport, or have in possession any Maxim silencer, bomb, nitroglycerin, giant, oriental, or thunderbolt powder, dynamite, ballistite, fulgarite, detonite, or any other explosive compound, or any inflammable material, or any instru-

ment or agency, with intent that the same shall be used in this state or anywhere else for the injury or destruction of public or private property, or the assassination, murder, injury, or destruction of any person or persons, either within this state or elsewhere, or knowing that such explosive compounds or such materials, instruments, or agencies are intended to be used by any other person or persons for any such purpose, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for not less than five years nor more than thirty years, or by a fine of not less than one thousand dollars nor more than twenty thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 6, Ex. L. 1918; re-en. Sec. 11281, R. C. M. 1921.

Collateral References

Explosives \$\\$4, 12.
35 C.J.S. Explosives \$\\$4, 12.
31 Am. Jur. 2d 891, Explosions and Explosives, \\$121.

94-35-185. (11282) Sale and manufacture of Maxim silencers and various explosives for wrongful use a felony—who are principals. All persons aiding, abetting, or in any manner assisting in the manufacture, compounding, buying, selling, offering for sale, or transporting any explosive compounds, or any inflammable material, or any instrument or agency, either by furnishing material or ingredients, or soliciting or contributing money or other property with which to purchase said materials or ingredients, or by assisting by skill or labor, or by acting as agents for the principal, or in any manner aiding as accessories before the fact, knowing that any of such explosive compounds, or such materials, instruments, or agencies are intended to be used by the principals or any other person or persons for any of the purposes mentioned in the preceding section, shall be deemed principals and may be convicted and punished in the same manner and to the same extent as such principal or principals.

History: En. Sec. 2, Ch. 6, Ex. L. 1918; re-en. Sec. 11282, R. C. M. 1921.

94-35-186. (11283) Sale and manufacture of Maxim silencers and various explosives for wrongful use a felony—possession presumptive evidence of what. The possession of any Maxim silencer or bomb of any kind, or chemical compounds intended only for the destruction of life or property, shall be presumptive evidence that the same are intended to be used in the destruction of or injury to property or life, within the meaning of this act.

History: En. Sec. 3, Ch. 6, Ex. L. 1918; re-en. Sec. 11283, R. C. M. 1921.

94-35-187. (11533) Scabby sheep. Every person who removes from one point to another in any of the counties of this state, or from one county to another, any scabby sheep, or any sheep that have been scabby within one year, without the written certificate of the sheep inspector, or the written consent of all the sheep owners or managers along the route, and in the vicinity of the proposed location, is punishable by a fine not exceeding one thousand dollars. This section does not apply to scabby sheep imported into this state and against which quarantine has been declared.

History: En. Sec. 1169, Pen. C. 1895; re-en. Sec. 8842, Rev. C. 1907; re-en. Sec. 11533, R. C. M. 1921.

Collateral References
Animals \$\infty 34.
3 C.J.S. Animals \$ 59.
4 Am. Jur. 2d 282-285, Animals, §§ 32, 33.

94-35-188. (11536) Receiving and transporting diseased sheep. Every person who, after the publication of the proclamation of the governor of this state prohibiting the importation of diseased sheep into this state, knowingly receives any such sheep from any of the prohibited districts, or transports the same within the limits of the state, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1172, Pen. C. 1895; re-en. Sec. 8845, Rev. C. 1907; re-en. Sec. 11536, R. C. M. 1921.

94-35-189. (11537) Moving diseased sheep. Every person in charge of sheep being shipped into this state, against which quarantine has been declared, as specified in the last preceding section, and fails to notify the deputy inspector of the county in which such sheep are brought, or allows any such sheep to pass over or upon any public highway, or upon the ranges occupied by other sheep, or within five miles of any corral in which sheep are regularly corralled, before such sheep are inspected as provided by law, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1173, Pen. C. 1895; re-en. Sec. 8846, Rev. C. 1907; re-en. Sec. 11537, R. C. M. 1921.

94-35-190. (11538) Importing diseased cattle into state. Every person who imports into this state any cattle, horses, mules, or asses, after the governor has made proclamation holding in quarantine for the purpose of inspection for contagious or infectious diseases, such animals, and allows the same or any of them to leave the place of their first arrival in this state, until they have been examined by the state veterinary surgeon, and a certificate has been obtained therefrom that such animals are free from disease, or permits any such animals to run at large, or to be removed, or to escape before such certificate has been received, is punishable by a fine not exceeding five hundred dollars. This section does not apply to any animals driven in harness, or under yoke, or ridden by their owners into this state.

History: En. Sec. 1174, Pen. C. 1895; re-en. Sec. 8847, Rev. C. 1907; re-en. Sec. 11538, R. C. M. 1921.

94-35-191. (11534) Infected animals—bringing into state. Every person who brings into this state sheep infected with scab or other infectious disease, or any horses, mules, asses or cattle infected with any contagious disease, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1170, Pen. C. 1895; re-en. Sec. 8843, Rev. C. 1907; re-en. Sec. 11534, R. C. M. 1921.

94-35-192. (11539) Receiving or transporting diseased cattle. Every person who, after the publication of such proclamation, knowingly receives or transports within the limits of this state, any animal mentioned in section

94-35-190, before the certificate mentioned therein has been given, is punishable by a fine not exceeding ten thousand dollars.

History: En. Sec. 1175, Pen. C. 1895; re-en. Sec. 8848, Rev. C. 1907; re-en. Sec. 11539, R. C. M. 1921.

94-35-193. (11535) State veterinary surgeon — disobeying orders of. Every person who fails to comply with or disregards any lawful order or direction made by the state veterinary surgeon, or deputy, or deputy sheep inspector, under the provisions of the code, concerning scab and other contagious diseases among sheep, or to prevent the spread of disease among cattle, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1171, Pen. C. 1895; re-en. Sec. 8844, Rev. C. 1907; re-en. Sec. 11535, R. C. M. 1921.

94-35-194. (11540) Obstructing veterinary surgeon, etc. Every person who owns or has the custody of any cattle, horses, mules or assess infected with a contagious disease, and fails to immediately report the same to the state veterinary surgeon, or conceals the existence of such disease, or attempts so to do, or willfully obstructs or resists the said veterinary surgeon in the discharge of his duty as provided by law, or sells, gives away or uses the meat or milk, or removes the skin or any part of such animal, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1176, Pen. C. 1895; re-en. Sec. 8849, Rev. C. 1907; re-en. Sec. 11540, R. C. M. 1921.

94-35-195. (11527) Schoolteachers—abuse of. Every parent, guardian, or other person, who upbraids, insults, or abuses any teacher of the public schools, in the presence or hearing of a pupil thereof, is guilty of a misdemeanor.

History: En. Sec. 1158, Pen. C. 1895; re-en. Sec. 8831, Rev. C. 1907; re-en. Sec. 11527, R. C. M. 1921. Cal. Pen. C. Sec. 653b.

Cross-Reference

Abuse of teachers, sec. 75-2408.

94-35-196. (11541) Selling horses, etc., at auction — recording sales. Every person who sells at auction any horses, mules, asses, or cattle, and fails to record in a book the name of the person who offers for sale said animals, the names of the owners with their residences, the color, brand, mark, size, and age of the animal offered for sale, or fails to keep said book open for the inspection of any person, is punishable by a fine not exceeding fifty dollars. This section does not apply to judicial sales.

History: En. Sec. 1177, Pen. C. 1895; re-en. Sec. 8850, Rev. C. 1907; re-en. Sec. 11541, R. C. M. 1921.

Collateral References
Auctions and Auctioneers 13.
7 C.J.S. Auctions and Auctioneers § 17.

94-35-197. (11043) Selling merchandise at camp meeting. Every person who erects or keeps a booth, tent, stall, or other contrivance for the purpose of selling or otherwise disposing of any article of merchandise, or who peddles or hawks about any such article within one mile of any camp or field

meeting for religious worship during the time of holding such meeting is punishable by a fine of not less than five nor more than five hundred dollars.

History: En. Sec. 535, Pen. C. 1895; re-en. Sec. 8374, Rev. C. 1907; re-en. Sec. 11043, R. C. M. 1921.

94-35-198. (11044) Persons who may sell merchandise at camp meetings. The provisions of the preceding section do not apply to a person carrying on a regular business in the sale of articles of merchandise which business was established prior to the appointment of the meeting referred to in the last section.

History: En. Sec. 536, Pen. C. 1895; re-en. Sec. 8375, Rev. C. 1907; re-en. Sec. 11044, R. C. M. 1921.

94-35-199. (11239) Repealed—Chapter 314, Laws of 1969.

Repeal of certain narcotics, was repealed by Sec. Section 94-35-199 (Sec. 680, Pen. C. 14, Ch. 314, Laws 1969. 1895), stating penalty for unlawful sale

94-35-200. (11550) Sheepherder—abandonment of sheep by—penalty. Every person who, having, by virtue of his employment as herder, driver or otherwise, the charge or custody of any sheep, shall willfully abandon the same, or allow them to stray from his charge or custody, shall, upon conviction, be punished by a fine of not less than one hundred dollars, or by imprisonment of not less than three months nor more than one year, or by both such fine and imprisonment; provided, that if the person so in the charge or custody of such sheep shall have given to the owner of such sheep, or his authorized agent, at least five days' notice of his intention to quit his employment, he shall not be deemed to have abandoned such sheep, within the meaning of this act, by leaving the same after the expiration of such period.

History: En. Sec. 1, Ch. 116, L. 1909; re-en. Sec. 11550, R. C. M. 1921.

Collateral References
Master and Servant 28.
56 C.J.S. Master and Servant 880.

94-35-201. (11568) Stealing rides upon cars or locomotives. It shall be and hereby is declared to be a misdemeanor for any person to enter upon, ride upon, or secure passage upon, any railroad car or locomotive or tender, of any description, other than a car used exclusively for the carriage of passengers, with intent thereby to obtain a ride without payment therefor, or fraudulently obtain carriage upon any such car, locomotive or tender.

History: En. Sec. 1, p. 150, L. 1899; re-en. Sec. 8882, Rev. C. 1907; re-en. Sec. 11568, R. C. M. 1921.

Collateral References Carriers © 22. 13 C.J.S. Carriers §§ 526, 542, 650.

94-35-202. (11569) Stealing rides on trucks, rods or brake beams. It shall be and is hereby declared to be a misdemeanor for any person excepting railroad employees in the performance of their duty, to take passage or ride upon, or enter for the purpose of taking passage or riding upon, the trucks, rods, brake beams, or any part of any car, locomotive, or tender

not ordinarily and customarily used, or intended for the resting place of a person riding upon or operating the same.

History: En. Sec. 2, p. 150, L. 1899; re-en. Sec. 8883, Rev. C. 1907; re-en. Sec. 11569, R. C. M. 1921.

94-35-203. (11570) Trainmen constituted peace officers. Every conductor, engineer or other person in charge of the operation of cars or trains, or locomotives, upon any railroad, is, while so engaged or employed, hereby constituted a public executive officer, of the class of peace officers, and of the grade of a constable in each county wherein his train or car, or cars, or locomotives may from time to time happen to be, and is hereby given the same authority as other peace officers to with or without a warrant arrest and prosecute persons violating any provision of this act; provided, however, that the persons mentioned herein shall not be entitled to receive fees for any arrest or prosecution which may be made or prosecuted under this act. And provided further, that none of the persons herein named shall be authorized to hold said office or exercise its functions unless at the time he shall be a citizen of the United States, and shall have been a citizen of this state for at least one year next preceding his exercising the functions thereof.

History: En. Sec. 3, p. 150, L. 1899; re-en. Sec. 8884, Rev. C. 1907; re-en. Sec. 11570, R. C. M. 1921.

Collateral References
Arreste ≈ 63 (2).
6 C.J.S. Arrest § 6.
5 Am. Jur. 2d 733, Arrest, § 42.

94-35-204. (11552.1) Stolen livestock—seizure and confiscating of vehicle used to transport. The use of any vehicle for the transportation of any stolen mule, horse, mare, colt, foal, filly, sheep, lamb, cow, calf, heifer, steer, bull, hogs, poultry, or the products of either thereof, shall be unlawful and such vehicle shall be forfeited to and confiscated by the state. Any such vehicle found in such use, or upon probable cause believed to be devoted wholly or in part to such use, shall be seized and held and, upon conviction in a proceeding in the name of the state of Montana against such vehicle, or against such vehicle and the owner, before any district court or judge thereof, shall be confiscated and sold; provided that such vehicle shall not be confiscated, or subject to forfeiture, if the same be a stolen vehicle at the time it is used for such unlawful transportation and the owner thereof is not in collusion with the party or parties guilty of the theft.

History: En. Sec. 1, Ch. 80, L. 1931; amd. Sec. 1, Ch. 132, L. 1963.

Collateral References
Forfeitures 3.
37 C.J.S. Forfeitures § 3.
36 Am. Jur. 2d 623, Forfeitures and Penalties, § 17.

94-35-205. (11552.2) Stolen livestock—seizure and confiscating of vehicle used to transport—payment of prior liens and disposal of proceeds. The officer making the sale, after deducting the expenses of keeping the property and the cost of the sale, so far as the balance of sale proceeds permit, shall pay all liens, according to their priorities, which are established, by intervention or otherwise in said proceedings, as being bona fide and as having been created without the lienor having any notice or reasonable

cause to believe that the vehicle was being or was to be used for such illegal transportation, and shall pay the balance of the proceeds to the treasurer of the state of Montana to be credited to the livestock commission fund.

History: En. Sec. 2, Ch. 80, L. 1931.

Collateral References

Forfeitures = 10.

37 C.J.S. Forfeitures §§ 8, 9. 36 Am. Jur. 2d 624, et seq., Forfeitures and Penalties, § 18 et seq.

94-35-206. (11552.3) Stolen livestock—seizure and confiscating of vehicle used to transport—service of process. Service of process in such proceeding for confiscation of such vehicle shall conform as far as practicable with the provisions of sections 93-3007 to 93-3015, both inclusive; provided, that in so far as the proceeding against the vehicle is concerned no copy of the summons or complaint need be mailed and no showing need be made under the provisions of said section 93-3013, and the service shall be complete upon publication.

History: En. Sec. 3, Ch. 80, L. 1931.

Compiler's Note

Sections 93-3007 to 93-3015, referred to in this section, have been repealed and superseded. Sections 93-3007, and 93-3015 were repealed by Sec. 84, Ch. 13, Laws 1961; sections 93-3009 and 93-3010 were repealed by Sec. 2, Ch. 189, Laws 1963; sections 93-3008, 93-3011 and

93-3012 were superseded by M. R. Civ. P., Rule 4D, as amended by Sup. Ct. Ord. 10750.

Collateral References

Forfeitures \$5. 37 C.J.S. Forfeitures \$5. 36 Am. Jur. 2d 634, Forfeitures and Penalties, \$36.

94-35-207. (11552.4) Stolen livestock—seizure and confiscating of vehicle used to transport—sale to be at public auction. Such sale shall be at public auction and otherwise in the manner of sales of personal property under execution, and may be made by any sheriff, livestock inspector, or other peace officer.

History: En. Sec. 4, Ch. 80, L. 1931.

94-35-208. (11047) Selling tobacco to minors. Every person who sells or gives any tobacco, cigars, cigarettes, or cigarette paper to any minor under eighteen years of age, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or imprisonment not to exceed three months in the county jail, or both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 542, Pen. C. 1895; re-en. Sec. 8381, Rev. C. 1907; re-en. Sec. 11047, R. C. M. 1921. Cal. Pen. C. Sec. 308.

94-35-209. Solicitation of certain foreign claims prohibited. Whoever obtains or solicits, for himself or another, employment in asserting outside the state of Montana any claim or right of action that arose within the state for death or personal injury in favor of a resident of the state and against a resident thereof or a corporation subject to service of process therein, is guilty of a misdemeanor.

History: En. Sec. 1, Ch. 100, L. 1945.

94-35-210. Prima facie evidence of violation of act. Proof of the solicitation of employment in asserting such claim or right of action, coupled with the commencement outside the state of an action to recover damages thereon, is prima facie evidence of a violation of section 94-35-209.

History: En. Sec. 2, Ch. 100, L. 1945.

94-35-211. (11195) Steam boilers—mismanagement of. Every engineer or other person having charge of any steam boiler, steam engine, or other apparatus for generating or employing steam, used in any manufactory, steamboat, railway, mining, milling, or other mechanical works, who willfully or from ignorance, or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or engine or apparatus or cause any other accident whereby human life is endangered, is guilty of a felony.

History: En. Sec. 632, Pen. C. 1895; re-en. Sec. 8443, Rev. C. 1907; re-en. Sec. 11195, R. C. M. 1921. Cal. Pen. C. Sec. 349.

Collateral References Steam 1. 82 C.J.S. Steam § 1.

94-35-212. (11196) Steam boilers—operating without license a misdemeanor. Every person who operates any steam boiler or steam engine without first obtaining a license from the boiler inspector or assistant boiler inspector, as required by law, and every owner, employer, or manager of any steam engine or boiler who knowingly permits any unlicensed engineer to operate any steam boilers or steam engines where a license is required, or who operates or causes to be operated any steam engine or boiler without having the same inspected and the inspector's certificate issued thereon as required by law, or who violates any of the provisions of sections 69-1501 to 69-1518 shall be deemed guilty of a misdemeanor and, upon conviction thereof, where no other punishment is prescribed, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail of not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 633, Pen. C. 1895; re-en. Sec. 8444, Rev. C. 1907; amd. Sec. 17, Ch. 30, L. 1913; re-en. Sec. 11196, R. C. M. 1921.

Collateral References Steam©=3. 82 C.J.S. Steam § 3. 50 Am. Jur. 600, Steam, § 3.

94-35-213. (11197) Unsafe steam boilers. Every owner, renter, or user of a steam boiler, who uses a boiler or steam engine which has become unsafe from any cause, or has been notified by the boiler inspector or his assistant that such boiler or steam engine is unsafe from any defect, or that repairs are necessary, and after such notice uses the same, is punishable by imprisonment in the county jail not exceeding three months, or by fine not exceeding two hundred and fifty dollars, or both.

History: En. Sec. 634, Pen. C. 1895; re-en. Sec. 8445, Rev. C. 1907; re-en. Sec. 11197, R. C. M. 1921.

94-35-214. (11198) False certificate of boiler inspector. If the state boiler inspector, or assistant inspector, willfully and falsely certifies regarding any steam boiler, steam engine, or its attachments, or grants a license to any person to act as engineer, contrary to law, he is punishable by imprison-

ment not exceeding one year in the county jail, or by a fine not exceeding five hundred dollars, or both.

History: En. Sec. 635, Pen. C. 1895; re-en. Sec. 8446, Rev. C. 1907; re-en. Sec. 11198, R. C. M. 1921.

Cross-Reference

Wrongful issuance of boiler inspection certificate, sec. 69-1511.

Collateral References

Steam 4. 82 C.J.S. Steam § 1.

94-35-215. (11261) Suicide—aiding or encouraging, a felony. Every person who deliberately aids, or advises or encourages another to commit suicide is guilty of a felony.

History: En. Sec. 698, Pen. C. 1895; re-en. Sec. 8529, Rev. C. 1907; re-en. Sec. 11261, R. C. M. 1921. Cal. Pen. C. Sec. 401.

Collateral References

Suicide 3. 83 C.J.S. Suicide § 4. 40 Am. Jur. 2d 845, Homicide, § 585.

Experimental evidence bearing upon question of suicide. 8 ALR 49 and 85 ALR 479.

Suicide as criminal offense or an unlawful act. 92 ALR 1180.
Suicide, liability of one who, while attempting to commit, kills another. 92 ALR 1184.

94-35-216. (11039) Sunday—certain activities on, forbidden. Every person who on Sunday, or the first day of the week, keeps open or maintains, or who aids in opening or maintaining any dance hall, dance house, race track, gambling house or poolroom, variety hall, or any other place of amusement where any intoxicating liquors are sold or dispensed, is guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to such dancing halls or pavilions as are maintained or conducted in public parks or playgrounds where no admission is charged, and where good order is maintained, and where no intoxicating liquors are sold.

History: En. Sec. 1, p. 519, Cod. Stat. 1871; re-en. Sec. 849, 5th Div. Rev. Stat. 1879; re-en. Sec. 1406, 5th Div. Comp. Stat. 1887; amd. Sec. 530, Pen. C. 1895; re-en. Sec. 8369, Rev. C. 1907; amd. Sec. 1, Ch. 92, L. 1915; re-en. Sec. 11039, R. C. M. 1921. Cal. Pen. C. Sec. 299.

Cross-Reference

Barber business not conducted on Sunday, sec. 94-3511.

Constitutionality

It is competent for the legislature to recognize different degrees of the possible evil tendencies inherent in different forms of amusement or entertainment, and classify the subjects for the purpose of appropriate regulation, without being open to the charge that the act is arbitrary or unwarranted; and in making selections for classification a wide latitude is permitted. State v. Loomis, 75 M 88, 92, 242 P 344.

This section, prohibiting the keeping open of dance halls, dance houses, etc., on Sunday, is not invalid as making an arbitrary classification between dance halls and theaters by exempting the latter places of amusement from the operation of the act, although prior thereto they had been included in one class subject to police regulation. State v. Loomis, 75 M 88, 92, 242 P 344.

The state has the right to prescribe the territorial limits within which dance houses or dance halls may be conducted on Sunday; therefore this section, providing that a dance hall or pavilion in a public park or playground may operate on Sunday under certain conditions, while one located outside thereof must remain closed on that day, does not arbitrarily discriminate between subjects of the same class, but does create two distinct classes based upon location, and hence is not objectionable as denying the equal protection of the law. State v. Loomis, 75 M 88, 92, 242 P 344.

"Dance House"

A dance house or dance hall is a place maintained for promiscuous and public dancing, the rules for admission to which are not based upon personal selection or invitations. State v. Loomis, 75 M 88, 92, 242 P 344.

Operation and Effect

This section, prohibiting the operation of dance halls, dance houses, etc., on Sunday, "or any other place of amusement where any intoxicating liquors are sold," construed, on application for writ of habeas corpus, and held, in view of the history of the legislation on Sunday observance and the pertinent rule of construction to interdict the operation of a dance hall on Sunday, even though intoxicating liquors are not sold therein. In re Klune, 74 M 332, 333, 240 P 286.

In view of the fact that the legislature

In view of the fact that the legislature has by statute recognized public dances as proper forms of public entertainment, subject only to reasonable regulation, it may not be said that the renting of school buildings for such dances is contrary to

public policy. Young v. Board of Trustees of Broadwater County High School, 90 M 576, 583, 4 P 2d 725.

Collateral References

Sunday € 6 (1).

50 Am. Jur. 822, Sundays and Holidays,

Work, labor, avocation, business, or the like, sports, games, or amusements as within Sunday laws. 4 ALR 382; 50 ALR 1050 and 56 ALR 813.

Sunday laws with respect to dance halls and dancing. 48 ALR 177 and 60 ALR 173.

Construction of statute or ordinance prohibiting or regulating sports and games on Sunday. 24 ALR 2d 813.

94-35-217. (11242) Tainted food—disposing of. Every person who sells, or keeps for sale, or otherwise disposes of any article of food, drink, drug, or medicine, knowing that the same has become tainted, decayed, spoiled, or otherwise unwholesome, or unfit to be eaten or drunk, with intent to permit the same to be eaten or drunk, is guilty of a misdemeanor.

History: En. Sec. 683, Pen. C. 1895; re-en. Sec. 8491, Rev. C. 1907; re-en. Sec. 11242, R. C. M. 1921. Cal. Pen. C. Sec. 383.

Collateral References

Druggists 212; Food 14.
28 C.J.S. Druggists §§ 5, 12, 14; 36A
C.J.S. Food §§ 22, 25.
35 Am. Jur. 2d 863 et seq., Food, § 74
et seq.

94.35-218. (11516) Telegraph messages — neglect or postponement. Every agent, operator, or employee of any telegraph office who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted or delivered, unless the charges thereon have been paid or tendered, or to require the sending, receiving, or delivering of any message counseling, aiding, abetting, or encouraging treason against the government of the United States or of this state, or other resistance to lawful authority, or any message calculated to further any plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or facilitate the escape of any criminal or person accused of crime.

History: En. Sec. 1150, Pen. C. 1895; re-en. Sec. 8823, Rev. C. 1907; re-en. Sec. 11516, R. C. M. 1921. Cal. Pen. C. Sec. 638.

Cross-Reference

Duty to deliver message, sec. 8-418.

Collateral References

Telecommunications©362. 86 C.J.S. Telegraphs, Telephones, Radio and Television § 115 et seq.

94-35-219. (11517) Employee using information from messages. Every agent, operator, or employee of any telegraph office, who in any way uses or appropriates any information derived by him from any private message

passing through his hands, and addressed to another person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1151, Pen. C. 1895; re-en. Sec. 8824, Rev. C. 1907; re-en. Sec. 11517, R. C. M. 1921. Cal. Pen. C. Sec. 639.

Collateral References

Telecommunications \$\sim 362\$.

86 C.J.S. Telegraphs, Telephones, Radio and Television § 117.

Cross-Reference

Disclosing contents of message, sec. 94-3321.

94-35-220. (11518) Clandestinely learning the contents of a telegram. Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently reads, or attempts to read, any message, or learn the contents thereof, while the same is being sent over any telegraph line, or willfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any message, whilst the same is in any telegraph office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is punishable as provided in the preceding section.

History: En. Sec. 1152, Pen. C. 1895; re-en. Sec. 8825, Rev. C. 1907; re-en. Sec. 11518, R. C. M. 1921. Cal. Pen. C. Sec. 640.

94-35-221. (11519) Bribing telegraphic operator. Every person who, by the payment or promise of any bribe, inducement, or reward, procures or attempts to procure any telegraph agent, operator or employee to disclose any private message, or the contents, purport, substance, or meaning thereof, or offers to any such agent, operator, or employee any bribe, compensation or reward, for the disclosure of any private information received by him by reason of his trust as such agent, operator, or employee or uses or attempts to use any such information so obtained, is punishable as provided in section 94-35-219.

History: En. Sec. 1153, Pen. C. 1895; re-en. Sec. 8826, Rev. C. 1907; re-en. Sec. 11519, R. C. M. 1921. Cal. Pen. C. Sec. 641,

94-35-221.1. Failure to relinquish party line or telephone for emergency call—penalty. Any person who fails to relinquish a telephone party line or a public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department, or for medical or spiritual aid or ambulance service, is punishable by imprisonment for not more than ten (10) days or by a fine of not more than twenty-five dollars (\$25.00) or by both such imprisonment and such fine

History: En. Sec. 1, Ch. 206, L. 1961.

94-35-221.2. Lack of knowledge as defense—emergency as defense. It is a defense to prosecution under section 94-35-221.1 that the accused did not know or did not have reason to know of the emergency in question, or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

History: En. Sec. 2, Ch. 206, L. 1961.

94-35-221.3. False pretext of emergency—penalty. Any person who requests another to relinquish a telephone party line or a public pay telephone on the pretext that he must place an emergency call, knowing such pretext to be false, is punishable by imprisonment for not more than ten (10) days or by a fine of not more than twenty-five dollars (\$25.00) or by both such imprisonment and such fine.

History: En. Sec. 3, Ch. 206, L. 1961.

94-35-221.4. Printing of act in directories. Every telephone company doing business in this state shall print a copy of sections 94-35-221.1 to 94-35-221.3 in each telephone directory published by it after the effective date of this act.

History: En. Sec. 4, Ch. 206, L. 1961,

Compiler's Note

Chapter 206, Laws of 1961 became effective July 1, 1961.

- 94-35-221.5. Abuse, harassment or extortion by telephone—evidence of intent—venue of offenses—penalty. (1) It is unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It is also unlawful to use a telephone to attempt to extort money or other thing of value from any person, or to disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any person at the place where the telephone call or calls were received.
- (2) The use of obscene, lewd or profane language or the making of a threat or lewd or lascivious suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.
- (3) Any offense committed by use of a telephone in the manner set forth in this section shall be deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received, and when an offense under this section is committed by making a telephone call or calls in one county which is or are received in another county, the jurisdiction is in either county.
- (4) Any violation of this section shall be punishable by a fine not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six (6) months, or by imprisonment in the state prison not exceeding five (5) years.

History: En. Sec. 1, Ch. 25, L. 1967.

94-35-221.6. False statements to harass by telephone—venue of offenses. Every person who telephones another and knowingly makes any

false statements concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephoned or any member of his family with intent to terrify, intimidate, harass or annoy the called person is guilty of a misdemeanor. Any offense by use of a telephone as herein set out may be deemed to have been committed at the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

History: En. Sec. 2, Ch. 25, L. 1967.

94-35-222. (11310) Toy pistols and similar appliances—selling or dealing in. Any person who shall sell, trade, exchange, or give away, or offer to sell, trade, exchange, or give away, or who shall have the possession of, what is known as toy pistols, toy cannons, cap pistols, explosive canes, or other devices or appliances for the use of blank cartridges or caps containing chlorate of potash mixture or other explosive substance; or any blank cartridge, paper caps, or other explosive substance prepared for, used in, or intended for use in toy pistols, cap pistols, explosive canes, or other such appliances, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 70, L. 1911; re-en. Sec. 11310, R. C. M. 1921.

Collateral References
Weapons & 4.
94 C.J.S. Weapons § 22.

94-35-223. (11311) Toy pistols and similar appliances—selling or dealing in—public nuisance—duty of officers. Toy pistols, toy cannons, cap pistols, explosive canes, and all such devices and appliances designated in the preceding section are hereby declared to be a public nuisance, and it shall be the duty of every officer authorized to make arrests, to seize every such toy pistol, article, and device, and bring the same before a committing magistrate.

History: En. Sec. 2, Ch. 70, L. 1911; re-en. Sec. 11311, R. C. M. 1921.

Collateral References
Nuisance©=61.
66 C.J.S. Nuisances § 47.

94-35-224. (11312) Toy pistols and similar appliances—selling or dealing in—magistrate to destroy. The magistrate before whom such toy pistol, article, or device is brought must cause the public destruction of the same, and no person owning or claiming to own any such toy pistol, article, or device shall have any right or action against any person or against the state, county, or city for the value of such article or for damages for the destruction thereof.

History: En. Sec. 3, Ch. 70, L. 1911; re-en. Sec. 11312, R. C. M. 1921.

Collateral References Nuisance©~78. 66 C.J.S. Nuisances § 169.

94-35-225. (11313) Duty of mayor. It shall be the duty of every mayor of every town or city in the state, to cause this act to be diligently enforced, and to cause the police officers of his city or town to arrest and make complaint against any and all persons offending against any of the provisions of this act.

History: En. Sec. 4, Ch. 70, L. 1911; re-en. Sec. 11313, R. C. M. 1921.

Collateral References
Municipal Corporations 168.
62 C.J.S. Municipal Corporations § 543.

94-35-226. (11199) Trade-marks—forging and counterfeiting of, a misdemeanor. Every person, association, or corporation who knowingly or willfully forges or counterfeits, or procures to be forged or counterfeited, any trade-mark or name used and recorded by any person in connection with his goods, or affixed thereto to distinguish them from the goods of any other person; or any person, association, or corporation who shall make use of any trade-mark or name, or anything similar thereto, which has been recorded in the office of the secretary of state for any other person, association, or corporation—with intent to palm off on the public any goods to which said forged, counterfeit, or similar trade-mark or name is affixed, as the goods of such person whose trade-mark or name is recorded—is guilty of a misdemeanor and subject to the penalty therefor provided—it being the intent of this act that any person owning or using a recorded trade-mark or name shall be protected in the exclusive use thereof.

History: En. Sec. 636, Pen. C. 1895; re-en. Sec. 8447, Rev. C. 1907; amd. Sec. 1, Ch. 94, L. 1913; re-en. Sec. 11199, R. C. M. 1921. Cal. Pen. C. Sec. 350.

Collateral References

Trade Regulation 339.

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 66 et seq., 135, 219 et seq.

219 et seq.
52 Am. Jur. 572, Trademarks, Tradenames, and Trade Practices, § 90.

94-35-227. (11200) Trade-marks—selling goods which bear counterfeit. Every person who sells or keeps for sale any goods upon or to which any counterfeited trade-mark has been affixed, after such trade-mark has been recorded in the office of the secretary of state, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

History: En. Sec. 637, Pen. C. 1895; re-en. Sec. 8448, Rev. C. 1907; re-en. Sec. 11200, R. C. M. 1921. Cal. Pen. C. Sec. 351.

52 Am. Jur. 572, Trademarks, Tradenames, and Trade Practices, § 90.

Collateral References

Trade Regulation 339.

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 66 et seq., 219

Entrapment to commit the crime of selling goods bearing counterfeit labels. 18 ALR 162; 66 ALR 478 and 86 ALR 263.

94-35-228. (11201) Definition of the phrase "counterfeit trade-marks," etc. The phrases "forged trade-mark" and "counterfeit trade-mark," or their equivalents, as used in this chapter, include every alteration or imitation of any trade-mark so resembling the original as to be likely to deceive.

History: En. Sec. 638, Pen. C. 1895; re-en. Sec. 8449, Rev. C. 1907; re-en. Sec. 11201, R. C. M. 1921. Cal. Pen. C. Sec. 352.

94-35-229. (11202) "Trade-mark" defined. The phrase "trade-mark," as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

History: En. Sec. 639, Pen. C. 1895; re-en. Sec. 8450, Rev. C. 1907; re-en. Sec. 11202, R. C. M. 1921. Cal. Pen. C. Sec. 353.

Compiler's Note

The phrase "three preceding sections" refers to section 94-35-226 to 94-35-228.

94-35-230. (11203) Refilling casks, etc., bearing trade-mark. Every person who has or uses any cask, bottle, siphon, vessel, case, box cover, label, or other thing bearing or having in any way connected with it the duly filed trade-mark or name of another, for the purpose of disposing, with intent to deceive or defraud, of any article other than that which such cask, vessel, bottle, case, cover, label, or other thing originally contained, or was connected with, by the owner of such trade-mark or name, is guilty of a misdemeanor.

History: En. Sec. 640, Pen. C. 1895; re-en. Sec. 8451, Rev. C. 1907; re-en. Sec. 11203, R. C. M. 1921. Cal. Pen. C. Sec. 354.

Collateral References

Trade Regulation \$\sim 370\$. 87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 76. 52 Am. Jur. 516, Trademarks, Tradenames, and Trade Practices, § 20.

94-35-231. (11204) Counterfeiting certain trade-marks. Whenever any person, association, or union of workingmen have adopted or shall hereafter adopt, for their protection any label, trade-mark, or form of advertisement announcing that goods to which such label, trade-mark, or form of advertisement shall be attached were manufactured by such person or by a member or members of such association or union, it shall be unlawful for any person or corporation to counterfeit or imitate such label, trade-mark, or form of advertisement. Every person violating this section shall, upon conviction, be guilty of a misdemeanor.

History: En. Sec. 641, Pen. C. 1895; re-en. Sec. 8452, Rev. C. 1907; re-en. Sec. 11204, R. C. M. 1921.

94-35-232. (11205) Penalty for unlawfully using trade-mark. Every person who shall use any counterfeit or imitate any label, trade-mark, or form of advertisement of any such person, union, or association, knowing the same to be counterfeit or imitation, shall be guilty of a misdemeanor.

History: En. Sec. 642, Pen. C. 1895; re-en. Sec. 8453, Rev. C. 1907; re-en. Sec. 11205, R. C. M. 1921.

94-35-233. (11206) Record of certain trade-marks. Every such person, association, or union that heretofore adopted, or shall hereafter adopt, a label, trade-mark, or form of advertisement as aforesaid, may file the same for record in the office of the secretary of state, by leaving two copies, counterparts or facsimiles thereof, with the secretary of state; said secretary shall deliver to such person, association, or union filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate of record shall in all suits and prosecutions under this act be sufficient proof of the adoption of such label, trade-mark, or form of advertisement, and of the right of said person, association, or union to adopt the same. No label shall be recorded that probably would be mistaken for a label already of record.

History: En. Sec. 643, Pen. C. 1895; re-en. Sec. 8454, Rev. C. 1907; re-en. Sec. 11206, R. C. M. 1921.

Collateral References

Trade Regulation 152 (Trade-Marks and Trade-Names and Unfair Competition 43).

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 130 et seq.

52 Am. Jur. 531 et seq., Trademarks, Tradenames, and Trade Practices, § 39 et seq.

94-35-234. (11207) Suits to protect certain trade-marks. Every such person, association, or union adopting a label, trade-mark, or form of advertisement, as aforesaid, may proceed by suit to enjoin the manufacture, use, display, or sale of any such counterfeit or imitation, and all courts having jurisdiction thereof shall grant injunctions to restrain such manufacture, use, display, or sale, and shall award the complainant in such suit such damages resulting from such wrongful manufacture, use, display, or sale as may by said court be deemed just and reasonable, and shall require the defendants to pay such person, association, or union the profits derived from such wrongful manufacture, use, display, or sale; and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to any officer of the court or to complainant to be destroyed.

History: En. Sec. 644, Pen. C. 1895; re-en. Sec. 8455, Rev. C. 1907; re-en. Sec. 11207, R. C. M. 1921.

Cross-Reference

Injunction to restrain unauthorized use, sec. 85-104.

Actual and Exemplary Damages—Proof Required

In an action for damages for the fraudulent use of a trade-mark (in which injunction also was sought) plaintiff must prove that the acts of defendant amounted to a willful misrepresentation calculated to injure plaintiff, or were actuated by a desire to deceive customers so that defendant's business would be increased thereby; in the instant case, the facts shown were held to warrant a verdict of \$750 actual damages where plaintiff expended \$1,627 combating defendant by radio and advertising; exemplary damages of \$5000, held not excessive. Truzzolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 420, 91 P 2d 415, overruled on other grounds in Fauver v. Wilkoske, 123 M 228, 239, 211 P 2d 420.

Suit for Injunction and Damages—Trial by Jury Not Error

Where manufacturer of tamales protected by a trade-mark sought to enjoin the owner of a store from fraudulently advertising and selling the same article manufactured by a different concern as plaintiff's product and also made claim for damages, the court in trying the cause as an action at law with the aid of a jury did not err in overruling defendant's objection to trial by jury. Truzzolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 416, 91 P 2d 415, overruled on other grounds in Fauver v. Wilkoske, 123 M 228, 239, 211 P 2d 420.

Collateral References

Trade Regulation 540 (Trade-Marks and Trade-Names and Unfair Competition 579).

87 C.J.S. Trade-Marks, Trade-Names, and Unfair Competition § 187 et seq.

52 Am. Jur. 616 et seq., Trademarks, Tradenames, and Trade Practices, § 140 et seq.

94-35-235. (11208) Penalties. Every person who shall use or display the genuine label, trade-mark, or form of advertisement of any such person, association, or union in any manner not authorized by such person, union, or association, shall be deemed guilty of a misdemeanor. In all cases where such association or union is not incorporated, suits under this act may be commenced and prosecuted by any officer or member of such association or union on behalf of and for the use of such association or union.

History: En. Sec. 645, Pen. C. 1895; re-en. Sec. 8456, Rev. C. 1907; re-en. Sec. 11208, R. C. M. 1921.

94-35-236. (11209) Penalties. Any person or persons who shall in any way use the name or seal of any person, association, or union, or officer thereof, in and about the name of goods or otherwise, not being authorized to use the same, shall be guilty of a misdemeanor.

History: En. Sec. 646, Pen. C. 1895; re-en. Sec. 8457, Rev. C. 1907; re-en. Sec. 11209, R. C. M. 1921.

94-35-237. (11225) Trespassing stock. It shall be unlawful for any person or persons to willfully drive, or cause to be driven, any livestock held in herd on or over any field, ranch property, or valid claim in process of title under any of the land laws of the United States, or under lease from the state of Montana, whether the same be fenced or not; provided, that any lands so owned, or under process of title, or under lease, and not fenced, shall be clearly defined by suitable monuments or stakes, and plough furrows, with printed or written notices indicating the lands so held.

History: En. Sec. 1, Ch. 103, L. 1903; re-en. Sec. 8474, Rev. C. 1907; re-en. Sec. 11225, R. C. M. 1921.

Civil Liability Not Annulled

The provisions of this and the following section do not annul the rule of civil liability for trespasses in driving or herding one's animals upon the lands of another, whether such lands are protected by an inclosure or not. Herrin v. Sieben, 46 M 226, 234, 127 P 323, overruled on other grounds in Simonson v. McDonald, 131 M 494, 501, 311 P 2d 982.

Collateral References

Animals ≈91. 3 C.J.S. Animals §§ 185-187.

94-35-238. (11226) Penalty for trespassing stock. Any violation of the provisions of this act shall render the owner, lessee, employee, or other person in control, or herder of such stock so driven or herded, or permitted to enter upon the property referred to in the preceding section, subject to a fine of not less than twenty-five dollars nor more than five hundred dollars.

History: En. Sec. 2, Ch. 103, L. 1903; re-en. Sec. 8475, Rev. C. 1907; amd. Sec. 1, Ch. 41, L. 1921; re-en. Sec. 11226, R. C. M. 1921.

Collateral References

Animals \$\sim 102.
3 C.J.S. Animals \$\sim 208, 209, 236, 237, 240, 244, 246-254.

94-35-239. (11227) Fines belong to school fund. All fines collected under the provisions of this act shall be converted into the school funds of the county in which the action is brought.

History: En. Sec. 3, Ch. 103, L. 1903; re-en. Sec. 8476, Rev. C. 1907; re-en. Sec. 11227, R. C. M. 1921.

Collateral References

Fines ≈ 20. 36A C.J.S. Fines § 19.

94-35-240. (11228) When act applicable. This act is not intended, and shall not apply to stock on range not held in herd, or not in charge of a herder

History: En. Sec. 4, Ch. 103, L. 1903; re-en. Sec. 8477, Rev. C. 1907; re-en. Sec. 11228, R. C. M. 1921.

94-35-241. (10949) Unauthorized communication with convict. Every person, not authorized by law, who, without the consent of the warden or other officer in charge of the state prison, communicates with any convict

therein, or brings into or conveys out of the state prison any letter or writing to or from any convict, is guilty of a misdemeanor.

History: En. Sec. 298, Pen. C. 1895; re-en. Sec. 8280, Rev. C. 1907; re-en. Sec. 10949, R. C. M. 1921, Cal. Pen. C. Sec. 171.

Collateral References
Prisons©=17½
72 C.J.S. Prisons § 22.

94-35-242. (11288) Unlawful assembly defined. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or to do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

History: Ap. p. Sec. 120, p. 206, Bannack Stat.; re-en. Sec. 134, p. 300, Cod. Stat. 1871; re-en. Sec. 134, 4th Div. Rev. Stat. 1879; re-en. Sec. 144, 4th Div. Comp. Stat. 1887; en. Sec. 744, Pen. C. 1895; re-en. Sec. 8568, Rev. C. 1907; re-en. Sec. 11288, R. C. M. 1921. Cal. Pen. C. Sec. 407.

Collateral References
Unlawful Assembly € 1.
91 C.J.S. Unlawful Assembly § 1.
46 Am. Jur. 130, Riots and Unlawful Assembly, § 10.

94-35-243. (11289) Punishment of rout and unlawful assembly. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

History: En. Sec. 745, Pen. C. 1895; re-en. Sec. 8569, Rev. C. 1907; re-en. Sec. 11289, R. C. M. 1921, Cal. Pen. C. Sec. 408.

Cross-Reference

Unlawful assembly, punishment, sec. 94-

94-35-244. (11290) Remaining present at place of riot, etc., after warning to disperse. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

History: En. Sec. 746, Pen. C. 1895; re-en. Sec. 8570, Rev. C. 1907; re-en. Sec. 11290, R. C. M. 1921. Cal. Pen. C. Sec. 409.

94-35-245. (11291) Magistrate neglecting or refusing to disperse rioters. If a magistrate having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is vested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

History: En. Sec. 144, p. 303, Cod. Stat. 1871; re-en. Sec. 144, 4th Div. Rev. Stat. 1879; re-en. Sec. 159, 4th Div. Comp. Stat. 1887; amd. Sec. 747, Pen. C. 1895; re-en. Sec. 8571, Rev. C. 1907; re-en. Sec. 11291, R. C. M. 1921. Cal. Pen. C. Sec. 410.

Cross-Reference

Officer's liability for neglect, sec. 94-5314.

Collateral References

Justices of the Peace 30. 51 C.J.S. Justices of the Peace 23.

94-35-246. (11559) Unlawful entries in races. It is hereby made unlawful in this state for any person or persons knowingly to enter or cause to be entered for competition or to compete for any purse, prize, premium, stake or sweepstakes offered or given by any agricultural or other society, association, person or persons or to drive any horse, mare, gelding, colt or filly under an assumed name or out of its proper class where such purse, prize,

premium, stake or sweepstakes, is to be decided by a contest of speed. Any person or persons found guilty of a violation of this section shall, upon conviction thereof, be imprisoned in the penitentiary for a period of not more than three years, or imprisoned in the county jail of the county in which the accused may be convicted for any period not more than six months, and shall be fined in any sum not exceeding one thousand dollars.

History: En. Sec. 1195, Pen. C. 1895; re-en. Sec. 8869, Rev. C. 1907; re-en. Sec. 11559, R. C. M. 1921.

Collateral References
Theaters and Shows ≈ 9.
86 C.J.S. Theaters and Shows §§ 3, 4, 58, 59.

94-35-247. (11560) Name of race horse. The name of any horse, for the purpose of entry for competition in any contest of speed, shall not be changed after having once contested for a prize, purse, premium, stake or sweepstakes, except as provided by the code of rules of the society or association under which the contest is advertised to be conducted. The class to which a horse belongs, for the purpose of an entry in any such contest of speed, shall be determined by the public performance of said horse in any former contest or trial of speed as provided by the rules of the society under which the proposed contest is advertised to be conducted. And any person or persons knowingly misrepresenting or fraudulently concealing the public performance of any former contest or trial of speed of any horse which he or they propose to enter for competition in any such contest, shall, upon conviction thereof, be liable to the same punishment as provided in the preceding section, whether he or they shall succeed in making said entry or not.

History: En. Sec. 1196, Pen. C. 1895; re-en. Sec. 8870, Rev. C. 1907; re-en. Sec. 11560, R. C. M. 1921.

94-35-248. (11521) Vagrants. 1. Every person (except an Indian) without visible means of living, who has the physical ability to work, and who does not seek employment, or labor when employment is offered him;

- 2. Every healthy beggar who solicits alms as a business;
- 3. Every person who roams about from place to place without any lawful business:
- 4. Every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof;
- 5. Every lewd and dissolute person, who lives in and about houses of ill fame, or who lives with or upon the earnings of a woman of bad repute; and.
 - 6. Every common prostitute and common drunkard,

is a vagrant, and punishable by imprisonment in the county jail not exceeding ninety days.

History: Ap. p. Sec. 1, p. 81, L. 1881; re-en. Sec. 242, 4th Div. Comp. Stat. 1887; en. Sec. 1155, Pen. C. 1895; re-en. Sec. 8828, Rev. C. 1907; re-en. Sec. 11521, R. C. M. 1921, Cal. Pen. C. Sec. 647.

Operation and Effect

A prosecution for vagrancy in a police court must be instituted and conducted in the name of the state. State ex rel. City of Butte v. District Court, 37 M 202, 204, 95 P 841.

Collateral References

Vagrancy S§ 1, 2. 91 C.J.S. Vagrancy §§ 1, 2. 55 Am. Jur. 445 et seq., Vagrancy, §§ 1 et seq. Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9 ALR 1366.

What amounts to vagrancy. 14 ALR 1482.

Constitutionality of vagrancy statutes and ordinances. 111 ALR 68.

What constitutes vagrancy within statute making vagrancy grounds for divorce. 135 ALR 854.

Validity of vagrancy statute and ordinances. 25 ALR 3d 792.

Validity of loitering statutes and ordinances. 25 ALR 3d 836.

94-35-249. Vending or coin-operated machines—operation with counterfeit slugs, etc., forbidden. Any person who, by means of any token, slug, false or counterfeited coin, or by any other means, method, trick or device whatsoever not lawfully authorized by the owner, lessee, or licensee of any lawful vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or connection with the sale, use or enjoyment of property or service, knowingly shall operate or cause to be operated, or shall attempt to operate or attempt to cause to be operated, any lawful vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America, or whoever shall take, obtain, accept or receive, from or by means of any such machine, coin-box telephone or other receptacle, any article of value of service or the use or enjoyment of any telephone, telegraph or other facility or service, without depositing in, delivering to and payment into such machine, coin-box telephone or receptacle the amount of lawful coin of the United States of America required therefor by the owner, lessee or licensee of such machine, coin-box telephone or other receptacle, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both.

History: En. Sec. 1, Ch. 83, L. 1945.

94-35-250. Penalty for manufacturing tokens, etc., for unlawful use. Any person who knowingly or having cause to believe that the same is intended for fraudulent or unlawful use on the part of the purchaser, donee or user thereof shall manufacture for sale, sell or give away any token, slug, blank, disc, tag, planchet, false, mutilated, sweated or counterfeited coin or any device or substance whatsoever intended or calculated to be placed, deposited or used or which may be so placed, deposited or used in any lawful vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance or connection with the sale, use or enjoyment of the property or service or the use or enjoyment of any telephone, telegraph or other facilities or service, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both.

History: En. Sec. 2, Ch. 83, L. 1945.

94-35-251. (11255) Violation of duty by employees of railroad companies. Every engineer, conductor, brakeman, switchtender, or other officer, agent, or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

History: En. Sec. 692, Pen. C. 1895; re-en. Sec. 8523, Rev. C. 1907; re-en. Sec. 11255, R. C. M. 1921. Cal. Pen. C. Sec. 393.

94-35-252. (11256) Violation of duty by railroads. Every person or corporation who owns, carries on, or has control of a railroad and fails to observe any of the regulations or requirements or perform any of the duties prescribed by law in reference to railroads, the penalty for which is not otherwise provided for in this code, is punishable by a fine not exceeding five thousand dollars.

History: En. Sec. 693, Pen. C. 1895; re-en. Sec. 8524, Rev. C. 1907; re-en. Sec. 11256, R. C. M. 1921.

Operation and Effect

If a person is injured by the failure of

a railroad company to comply with section 72-501, with reference to keeping the right of way free from combustible material, his damages are compensatory only. Cooper v. Northern Pacific Ry. Co., 212 Fed 533, 535.

94-35-253. (11558) Wearing certain uniforms prohibited. Every person, other than an officer or enlisted man of the national guard of the state of Montana, or of any other state, or of the United States army or navy, marine corps or revenue service or forest service, or instructor, or student in a military school, or inmate of any veterans' or soldiers' home, who at any time wears the uniform of the United States army or navy or national guard, or any part of such uniform, or a uniform or part of a uniform similar thereto, within the bounds of the state of Montana, is guilty of a misdemeanor, and if found guilty of such offense shall be punishable by a fine of not less than one hundred nor more than two hundred and fifty dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment; provided, that nothing in this act shall be construed as prohibiting persons of the theatrical profession from wearing such uniform in any playhouse or theater while actually engaged in following said profession, and provided, that nothing in this act shall be construed as prohibiting the uniform rank of civic societies parading or traveling in a body or assembling in a lodge room; and provided, further, that whenever the national guard, or any part thereof is in active service, or is called into active service, no civic organization or member thereof shall parade or appear in uniform in the locality where said national guard is in service.

History: En. Sec. 1, Ch. 58, L. 1909; re-en. Sec. 11558, R. C. M. 1921.

Collateral References
Armed Services 40 (1) (5).
6 C.J.S. Army and Navy § 39.

94-35-254. (11571) Wearing mask or disguise. It is unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of

- 1. Evading or escaping discovery, recognition or identification in the commission of any public offense.
- 2. Concealment, flight or escape when charged with, arrested for, or convicted of any public offense. Any person violating any of the provisions of this section is guilty of a misdemeanor.

History: En. Sec. 324, Pen. C. 1895; re-en. Sec. 8288, Rev. C. 1907; re-en. Sec. 11571, R. C. M. 1921. Cal. Pen. C. Sec. 185. Collateral References
Escape©=1.
30A C.J.S. Escape §§ 1, 5, 6, 7.

94-35-255. (11194) Willfully poisoning food, medicine or water. Every person who willfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being to his injury, and every person who willfully poisons any well, spring, or reservoir of water, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years.

History: En. Sec. 631, Pen. C. 1895; re-en. Sec. 8442, Rev. C. 1907; re-en. Sec. 11194, R. C. M. 1921, Cal. Pen. C. Sec. 347. Collateral References
Poisons©~7.
72 C.J.S. Poisons § 9.

94-35-256. (11220) Workmen—false representation to procure. It shall be unlawful for any person or persons, society, company, association, corporation, or organization of any kind doing business in this state to induce, influence, persuade, or engage workmen to change from one place to another in this state, through or by means of deception, misrepresentation, and false advertising concerning the kind or character of the work, or the sanitary or other conditions of employment, or as to the existence of a strike or other trouble pending between the employer and the employees, at the time of, or immediately prior to, such engagement. Failure to state in any advertisement, proposal, or contract for the employment of workmen that there is a strike, lockout, or other labor trouble at the place of the proposed employment, when in fact such strike, lockout, or other trouble then actually exists at such place, shall be deemed a false advertisement and misrepresentation for the purpose of this act.

History: En. Sec. 1, Ch. 80, L. 1903; re-en. Sec. 8469, Rev. C. 1907; re-en. Sec. 11220, R. C. M. 1921.

Collateral References.
31 Am. Jur. 513, Labor, § 172.

94-35-257. (11221) Workmen—false representation to procure—penalty. Every person, company, corporation, society, association, or organization of any kind doing business in this state, violating any of the provisions of this act, is punishable by a fine of not less than one hundred dollars nor more than two thousand dollars.

History: En. Sec. 2, Ch. 80, L. 1903; re-en. Sec. 8470, Rev. C. 1907; re-en. Sec. 11221, R. C. M. 1921.

NOTE.—See sec. 94-3556 for right of action for damages resulting from the acts prohibited above.

94-35-258. Endurance races of horses prohibited. It shall be unlawful for any person, firm, corporation, association or organization within the state of Montana to sponsor, promote, conduct, or participate in sponsoring, promoting or conducting any horse race, commonly known as an endurance race, for a distance of more than two (2) miles.

History: En. Sec. 1, Ch. 27, L. 1949.

Collateral References Animals \$\infty 40. 3 C.J.S. Animals § 70. 94-35-259. Penalty for running endurance horse race. Any person, firm, corporation, association, or organization violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than two hundred fifty dollars (\$250.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail of not less than ninety [90] days or more than [1] year.

History: En. Sec. 2, Ch. 27, L. 1949.

Collateral References Animals \$\infty 41. 3 C.J.S. Animals \\$ 75.

94-35-260. State tax stamps—failure to affix or cancel—removal—penalty—counterfeiting tax stamp or insignia of Montana or other state—penalty. (a) Every person required by law to affix any tax stamp or insignia of the state of Montana, to or upon any article to evidence the payment of a tax or license thereon, who shall fail, neglect or refuse to affix such stamp or insignia thereto, or to affix it in the proper place, or to cancel it, in the manner and as required by law, or as required by rules and regulations of the state board of equalization of this state when charged with administering any act relating thereto, or who shall willfully remove any such affixed stamp or insignia from any such article and affix it to another such article required by law to be so stamped or marked, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not less than thirty (30) days, nor more than six (6) months, or by a fine of not less than one hundred dollars (\$100.00), nor more than three hundred dollars (\$300.00), or by both such fine and imprisonment.

(b) Every person without authority of law, who shall willfully make, print, manufacture, counterfeit, or attempt to make, print, manufacture or counterfeit any such stamp or insignia of the state of Montana or of any other state, or who shall, without authority of law, have in his possession any such counterfeit stamp or insignia, die, equipment or material for the making, printing, manufacturing or counterfeiting of any such stamp or insignia, or who shall be concerned therewith, is guilty of a felony and shall be punished by imprisonment in the state prison not less than one (1) year, nor more than five (5) years, or by a fine of not less than one thousand dollars (\$1,000.00), nor more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 43, L. 1949.

Collateral References

Counterfeiting 56; Licenses 40. 20 C.J.S. Counterfeiting § 9; 53 C.J.S. Licenses § 66.

94-35-261. Importing or selling farm machinery with altered, defaced or removed serial number. No person, firm or corporation shall import, or cause to be imported into the state of Montana any tractor, forage blower, combine, thresher, forage harvester, hay baler, power mower or any other item of heavy farm machinery on which the serial numbers have been destroyed, removed, altered, covered or defaced; nor transport, sell, offer for sale or otherwise dispose of any such farm implements or machinery within the state of Montana knowing the same to have been imported in violation of this act.

History: En. Sec. 1, Ch. 167, L. 1953.

94-35-262. Altering, defacing or removing serial number on farm machinery. No person, firm, association or corporation shall destroy, remove, alter, cover, or deface the manufacturer's serial numbers from any tractor, forage blower, combine, thresher, forage harvester, hay baler, power mower or any other item of heavy farm machinery having such numbers.

History: En. Sec. 2, Ch. 167, L. 1953.

94-35-263. Penalty. Any willful violation of any of the provisions of this act shall constitute a misdemeanor.

History: En. Sec. 3, Ch. 167, L. 1953.

- 94-35-264. Furnishing certain articles to and receiving articles from prisoners in state prison—receiving such articles by prisoners—felony. (1) A person may not furnish or attempt to furnish to an inmate of the state prison, nor may an inmate receive or attempt to receive any of the following items without the consent of the warden:
- (a) Any liquid containing one-half of one per cent ($\frac{1}{2}$ of 1%) or more of alcohol by volume which is fit for use for a beverage.
- (b) Knives, razors, drugs, narcotics, guns, ammunition, ropes, ladders, money or clothing other than that issued at the prison.
- (2) A person, including a member of the correctional staff, may not receive or attempt to receive an inmate, for his own use or for transmittal to another inmate or someone outside the prison, any money, merchandise, or messages.
- (3) A person who violates this section is punishable upon conviction, by imprisonment in the state prison for a term not exceeding ten (10) years, or a fine not exceeding ten thousand dollars (\$10,000), or both.

History: En. Sec. 1, Ch. 177, L. 1953; amd. Sec. 77, Ch. 199, L. 1965.

Collateral References
Prisons 17½.
72 C.J.S. Prisons § 22.

94-35-265. Abandoning or permitting abandoned icebox in dangerous condition—penalty. Any person, firm or corporation abandoning or discarding in any place accessible to children any refrigerator, icebox or ice chest, of a capacity of one and one-half cubic feet or more, which has an attached lid or door which may be opened or fastened shut by means of an attached latch, or who, being the owner, lessee, or manager of such place, knowingly permits such abandoned or discarded refrigerator, icebox or ice chest to remain in such condition, shall be deemed negligent as a matter of law and shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars (\$50.00), or imprisoned not more than thirty (30) days, or both.

History: En. Sec. 1, Ch. 126, L. 1955.

94-35-266 to 94-35-268. Repealed—Chapter 285, Laws of 1959.

Repeal 1957), relating to life saving equipment Sections 94-35-266 to 94-35-268 (Secs. 1-3, Ch. 139, L. 1955; Sec. 1, Ch. 15, L. 285, Laws 1959.

94-35-269. Hunting in careless or reckless manner—failure to assist person injured or wounded—misdemeanor. Any person who, in the act

of pursuing, taking or killing game animals or game birds, shall act in a careless or reckless manner, or with wanton disregard of human life or property, or who knowingly fails to give all reasonable assistance to any person whom he has injured or wounded, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and upon conviction thereof, be punished as provided by law.

History: En. Sec. 1, Ch. 189, L. 1955.

94-35-270. Delivery of grain containing toxic chemicals to public warehouses. It shall be unlawful for any person, firm, corporation or association, to deliver to any public warehouse, any grain in bulk, if such grain contains toxic chemicals, providing such person, firm, corporation or association knew, or upon the exercise of reasonable diligence, could have known of the presence of toxic chemicals in the grain.

History: En. Sec. 1, Ch. 9, L. 1957.

94-35-271. Penalty for violation. Any person, firm, corporation or association violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) and not less than two hundred fifty dollars (\$250.00) or be imprisoned for not more than six (6) months and not less than thirty (30) days, or both.

History: En. Sec. 2, Ch. 9, L. 1957.

94-35-271.1. Coloration of wheat, oats, rye or barley treated with injurious or toxic substances. Any wheat, oats, rye or barley treated with any injurious or toxic substance or chemical shall at the same time be colored or dyed a color contrasting with the natural color of such wheat, oats, rye or barley, so that the treated wheat, oats, rye or barley is readily identifiable as having been treated with an injurious or toxic substance or chemical.

History: En. Sec. 1, Ch. 80, L. 1959.

94-35-271.2. Sale or offering for sale product in violation of act prohibited. No person, firm, corporation or association shall sell or offer for sale, any wheat, oats, rye or barley which has been treated with any injurious or toxic substance or chemical unless the wheat, oats, rye or barley has been colored or dyed a color contrasting with the natural color of the wheat, oats, rye or barley. This act shall not apply to the treatment of any wheat, oats, rye or barley which solely is for the killing of insects which might be present therein. Provided, however, that if such treatment uses any injurious or toxic substance for the killing of insects, then such grain must be colored or dyed as hereinabove provided if offered for sale.

History: En. Sec. 2, Ch. 80, L. 1959.

94-35-271.3. Violation constitutes misdemeanor. Any person, firm, corporation or association violating any of the provisions of this act shall be guilty of a misdemeanor.

History: En. Sec. 3, Ch. 80, L. 1959.

94-35-272. Unlawful operation, use, interference, or tampering of aircraft—penalty. Every person who shall willfully operate or use any aircraft without the consent of the owner, or who shall willfully interfere or tamper with any aircraft without the consent of the owner, or who shall willfully put into operation the engine of any aircraft without the consent of the owner, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not more than six (6) months or by a fine of not more than five hundred dollars (\$500.00) or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 83, L. 1957.

94-35-273. Switchblade knives—possession, selling, using, giving, or offering for sale—penalty—collectors. Every person who carries or bears upon his person or who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him or who owns, possesses, uses, stores, gives away, sells or offers for sale, a switchblade knife shall be punished by a fine not exceeding five hundred dollars (\$500.-00) or by imprisonment in the county jail for a period not exceeding six (6) months or by both such fine and imprisonment; provided, that a bona fide collector, whose collection is registered with the sheriff of the county in which said collection is located, is hereby exempted from the provisions of this act. For the purpose of this section a switchblade knife is defined as any knife which has a blade one and one-half (1½) inches long or longer, which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

History: En. Sec. 1, Ch. 243, L. 1957.

Recording of conversation without knowledge of parties 94-35-274. prohibited. It shall be unlawful to record or cause to be recorded by use of any hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Violation hereof shall constitute a misdemeanor.

History: En. Sec. 1, Ch. 228, L. 1965.

94-35-275. Public officials and public meetings exempt—warning of recording. Section 94-35-274 shall not apply to duly elected or appointed public officials or employees when such transcription or recording is done in the performance of official duty; and persons speaking at public meetings or given warning of such recording.

History: En. Sec. 2, Ch. 228, L. 1965.

CHAPTER 36

OBSCENITY-LITERATURE-INDECENT EXPOSURE-HOUSES OF ILL FAME—PROHIBITION OF CERTAIN ADVERTISEMENTS

Section 94-3601. Obscene literature.

Penalty. 94-3602.

94-3603. Indecent exposures, exhibitions and pictures. 94-3604. Seizure of indecent articles authorized.

94-3605. Their character to be summarily determined.

94-3606. Their destruction.

94-3607. Keeping or residing in a house of ill fame.

94-3608. Keeping disorderly houses.
94-3609. Advertising to produce miscarriage.
94-3610. Enticing to place of gambling or prostitution.
94-3611. Prohibition against a certain class of advertisements.
94-3612. Distribution of circulars.
94-3613. Penalties.
94-3614. Penalties.
94-3615. Production of advertisement prima facie evidence of guilt.
94-3616. Contraceptives, sex-inciting devices, articles for prevention of veneral disease, sale or disposal of, prohibited, when.
94-3617. Contraceptives and prophylactics, advertising of, forbidden.
94-3618. Seizure of illegal stock authorized.
94-3619. Penalty for violation of act.

94-3601. (11134) Obscene literature. (1) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material, that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is directed to minors under 18 years of age, predominant appeal shall be judged with reference to such class of minors.

"Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation of any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment machines or materials.

"Person" means any individual, partnership, firm, association, corporation, or other legal entity.

"Distribute" means to transfer possession of, whether with or without consideration.

"Knowingly" means having knowledge of the character and content of the subject matter or failure to exercise reasonable inspection which would disclose the content and character of the same.

- (2) It is unlawful for any person to knowingly: send or cause to be sent, or bring or cause to be brought, into this state for sale or distribution, or in this state prepare, publish, print, exhibit, distribute, or offer to distribute, any obscene matter.
- (3) It is unlawful for any person to knowingly: send or cause to be sent, or exhibit or distribute or offer to distribute any obscene matter to a minor under 18 years of age, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age.
- (4) It is unlawful for any person, while in possession of such facts that he should reasonably know that a person is a minor under 18 years of age, to hire, employ or use such minor to do or assist in doing any of the acts described in the foregoing paragraphs.
- (5) It is unlawful for a person to write or create advertising or solicit anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene.

- (6) No person shall, as a condition to a sale or delivery for resale of any publication not above described or not within the purview of the foregoing section, require that the purchaser or consignee receive for resale or redistribution any other publication or article whatsoever within or reasonably believed by such purchaser or consignee to be within the purview of the foregoing paragraph.
- (7) The prohibitions and penalties imposed hereby shall not extend to publications within any constitutional guarantee of freedom of the press or freedom of religious worship, nor to publications privileged for medical instruction, privileged as official law enforcement bulletins or publications, nor to publications or reproductions of bona fide works of literature and the fine arts.
- (8) In any criminal action brought under the foregoing sections, both the people and the defendant shall have the right to trial by jury on the issue of obscenity.
- (9) The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the (title or description of matter) to be obscene." Or: "We find the (title or description of matter) not to be obscene," as they find each item is or is not obscene.

History: En. Secs. 1, 2, p. 255, L. 1891; amd. Sec. 560, Pen. C. 1895; re-en. Sec. 8391, Rev. C. 1907; re-en. Sec. 11134, R. C. M. 1921; amd. Sec. 1, Ch. 214, L. 1955; amd. Sec. 1, Ch. 276, L. 1967.

Constitutionality

Justice Frankfurter in his dissenting opinion in the Winters Case considered this to be one of the statutes throughout the country that would fall under the majority decision in that case as "void for vagueness." Winters v. New York, 333 U S 507, 523, 92 L Ed 840, 853, 67 S Ct 665, 674.

Collateral References

Obscenity 5.

67 C.J.S. Obscenity § 7. 33 Am. Jur. 20 et seq., Lewdness, Indecency, and Obscenity, § 9 et seq.

Entrapment to commit offense of selling obscene matter. 18 ALR 171; 66 ALR 503 and 86 ALR 269.

Selling obscene literature as breach of peace bond, 54 ALR 393,

Exclusion from evidence of parts of publication, or mail matter, other than those charged to be obscene, or oral testi-

mony relating to purpose or effect of publication as a whole. 69 ALR 644.

Scientific, educational, or instructive publications regarding sex relations as within statutes relating to obscene or immoral publications. 76 ALR 1099.

What amounts to an obscene play or book within prohibition statute. 81 ALR

Obscenity, modern concept of. 5 ALR 3d 1158.

Obscenity, validity of procedures designed to protect public against. 5 ALR

Validity and construction of federal statutes (18 USC §§ 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears on envelope, outside cover, wrapper, or on postal card. 11 ALR 3d 1276.

94-3602. (11135) Penalty. (1) Every person who violates section 94-3601 (2) is punishable by fine of not more than one hundred dollars (\$100.00) plus five dollars (\$5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the provisions of this chapter, which is involved in the offense, not to exceed one thousand dollars (\$1,000) or by imprisonment for not more than 30 days. If such person has previously been convicted of a violation of this section, he is punishable by fine of not more than five hundred dollars

(\$500.00) plus five dollars (\$5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed twenty-five hundred dollars (\$2,500.00), or by imprisonment for not more than one year, or by both such fine and such imprisonment.

- Every person who violates sections 94-3601 (3), (4) or (5) is punishable by fine of not more than one hundred dollars (\$100.00) or by imprisonment for not more than 30 days, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of either of these sections, he is punishable by imprisonment in the state prison not exceeding two years.
- Every person who violates section 94-3601 (6) is punishable by fine of not more than one hundred dollars (\$100.00) or by imprisonment for not more than 30 days, or by both such fine and imprisonment. For a second and subsequent offense he shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment for not more than one year, or by both such fine and imprisonment.

History: En. Sec. 561, Pen. C. 1895; re-en. Sec. 8392, Rev. C. 1907; re-en. Sec. 11135, R. C. M. 1921; amd. Sec. 2, Ch. 214, L. 1955; amd. Sec. 2, Ch. 276, L. 1967.

Collateral References Obscenity 5. 67 C.J.S. Obscenity § 7.

94-3603. (11136) Indecent exposures, exhibitions and pictures. Every person who willfully and lewdly either:

- 1. Exposes his person, or the private parts thereof, in any public place or in any place where there are other persons present to be offended or annoyed thereby; or,
- 2. Procures, counsels, or assists any person to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,
- 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book, or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print, or moulds, cuts, casts, or otherwise makes any obscene or indecent figure; or,
- 4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or,
- 5. Sings any lewd or obscene song, ballad, or other words in any public place or in any place where there are persons present to be annoyed thereby, is guilty of a misdemeanor.

History: En. Sec. 562, Pen. C. 1895; re-en. Sec. 8393, Rev. C. 1907; re-en. Sec. 11136, R. C. M. 1921. Cal. Pen. C. Sec.

Collateral References

Obscenity 3, 5, 6.

67 C.J.S. Obscenity §§ 7, 8. 33 Am. Jur., Lewdness, Indecency, and Obscenity, p. 19, § 7; p. 20, § 9 et seq.

Vagrancy, lewdness as. 14 ALR 1498. Radio act, provisions in, against use of obscene language. 76 ALR 1277 and 171 ALR 780.

Criminal offense predicated upon indecent exposure. 93 ALR 996 and 94 ALR 2d 1353.

Validity, construction and application of statutes or ordinances relating to wearing apparel or lack of it. 110 ALR 1233. 94-3604. (11137) Seizure of indecent articles authorized. Every person who is authorized or enjoined to arrest any person for a violation of section 94-3601 (2) or (3), is equally authorized and enjoined to seize any obscene matter found in possession, or under the control of the person so arrested, and to deliver the same to the district court.

History: En. Sec. 563, Pen. C. 1895; re-en. Sec. 8394, Rev. C. 1907; re-en. Sec. 11137, R. C. M. 1921; amd. Sec. 1, Ch. 230, L. 1965. Cal. Pen. C. Sec. 312.

Collateral References
Obscenity©=22.
67 C.J.S. Obscenity § 17.

94-3605. (11138) Their character to be summarily determined. If the seizure be controverted, the district court to whom any obscene matter is delivered pursuant to the foregoing section or to the return of a search warrant must, within ten (10) days after service of the motion for restoration proceed to take testimony in relation thereto. A decision as to whether there is a probable cause to believe the seized material to be obscene shall be rendered by the court within two (2) days of the conclusion of the restoration proceedings.

History: En. Sec. 564, Pen. C. 1895; 11138, R. C. M. 1921; amd. Sec. 2, Ch. 230, re-en. Sec. 8395, Rev. C. 1907; re-en. Sec. L. 1965. Cal. Pen. C. Sec. 313.

94-3606. (11139) Their destruction. Upon the conviction of the accused, such county attorney must cause any obscene matter, in respect whereof the accused stands convicted and which remains in the possession or under the control of such county attorney, to be destroyed.

History: En. Sec. 565, Pen. C. 1895; re-en. Sec. 8396, Rev. C. 1907; re-en. Sec. 11139, R. C. M. 1921; amd. Sec. 3, Ch. 230, L. 1965. Cal. Pen. C. Sec. 314.

Collateral References
Obscenity © 22.
67 C.J.S. Obscenity § 17.

94-3607. (11140) Keeping or residing in a house of ill fame. Every person who keeps a house of ill fame in this state, resorted to for the purposes of prostitution or lewdness or who willfully resides in such house is guilty of a misdemeanor.

History: En. Sec. 566, Pen. C. 1895; re-en. Sec. 8397, Rev. C. 1907; re-en. Sec. 11140, R. C. M. 1921. Cal. Pen. C. Sec. 315.

Collateral References
Disorderly House 5, 7.
27 C.J.S. Disorderly Houses §§ 5, 7.
24 Am. Jur. 2d, Disorderly Houses, p.
86, § 8; p. 91 et seq., § 14 et seq.

94.3608. (11141) Keeping disorderly houses. Every person who keeps any disorderly house or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.

History: En. Sec. 567, Pen. C. 1895; re-en. Sec. 8398, Rev. C. 1907; re-en. Sec. 11141, R. C. M. 1921. Cal. Pen. C. Sec. 316.

Cross-References

Abatement of building as nuisance, secs. 94-1002 to 94-1011.

Prostitution, secs. 94-4110 to 94-4117.

Illegal Use of Premises by Vendee

Where the vendee-madam sought to void mortgage given vendor-madam on property used exclusively for prostitution, on the grounds that vendor-madam knew the property was to be used in violation of the laws and public policy of Montana, bare knowledge of the illegal purpose was

not sufficient to void the contract in the the part of the seller. Carroll v. Beardon, 142 M 40, 381 P 2d 295. absence of more active participation on

94-3609. (11142) Advertising to produce miscarriage. Every person who willfully writes, composes or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement or otherwise, to assist in the accomplishment of such purpose is guilty of a misdemeanor.

History: En. Sec. 568, Pen. C. 1895; re-en. Sec. 8399, Rev. C. 1907; re-en. Sec. 11142 R. C. M. 1921. Cal. Pen. C. Sec. 317.

Collateral References

Abortion 1; Obscenity 7. 1 C.J.S. Abortion §§ 11, 12, 44 et seq.; 67 C.J.S. Obscenity § 7.
1 Am. Jur. 2d 194, Abortion, § 12; 33 Am. Jur. 24, Lewdness, Indecency and

Obscenity, § 15.

94-3610. (11143) Enticing to place of gambling or prostitution. Whoever through invitation or device prevails upon any person to visit any room, building, or other places kept for the purpose of gambling or prostitution is guilty of a misdemeanor.

History: En. Sec. 569, Pen. C. 1895; re-en. Sec. 8400, Rev. C. 1907; re-en. Sec. 11143, R. C. M. 1921. Cal. Pen. C. Sec. 318.

Cross-References

Admission of minor to place of prostitution, sec. 94-35-137.

Persuading persons to visit gambling resorts, penalty, sec. 94-2407.

Procuring women for house of ill fame, secs. 94-4110, 94-4111.

Collateral References

Gaming 77; Prostitution 1. 38 C.J.S. Gaming §§ 1, 107; 73 C.J.S.

Prostitution § 3 et seq.
38 Am. Jur. 2d 202 et seq., Gambling, § 129 et seq.; 42 Am. Jur. 263, Prostitution, § 3.

(11144) Prohibition against a certain class of advertisements. No newspaper or other paper published or circulated in whole or in part within the state of Montana shall contain advertisements of cures, appliances, or treatments for certain diseases or disorders, to wit: stricture, syphilis, impotency, gonorrhoea, emissions, and so-called "lost manhood," and other private diseases of men and women, and their complications.

History: En. Sec. 1, Ch. 191, L. 1907; Sec. 8401, Rev. C. 1907; re-en. Sec. 11144, R. C. M. 1921.

(11145) Distribution of circulars. It is hereby made unlawful to distribute any circulars, dodgers or advertising matter whatsoever advertising remedies for the cure of any of the diseases mentioned in section 94-3611.

History: En. Sec. 2, Ch. 191, L. 1907; Sec. 8402, Rev. C. 1907; re-en. Sec. 11145, R. C. M. 1921.

94-3613. (11146) Penalties. The person advertising, as well as the proprietor, editor, or any person in charge of any newspaper or printing establishment, violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months.

History: En. Sec. 3, Ch. 191, L. 1907; Sec. 8403, Rev. C. 1907; re-en. Sec. 11146, R. C. M. 1921.

94-3614. (11147) Penalties. Any person publishing, distributing, or causing to be distributed or circulated, any of the advertising matter hereinabove prohibited shall be guilty of a misdemeanor and punished as prescribed in the preceding section.

History: En. Sec. 4, Ch. 191, L. 1907; Sec. 8404, Rev. C. 1907; re-en. Sec. 11147, R. C. M. 1921.

94-3615. (11148) Production of advertisement prima facie evidence of guilt. The production of any advertisement or advertising matter published or distributed contrary to the provisions of this act shall be, of itself, prima facie evidence of the guilt of the person or persons advertising to cure any such disease hereinabove mentioned, or of the publisher who publishes any matter such as is herein prohibited.

History: En. Sec. 5, Ch. 191, L. 1907; Sec. 8405, Rev. C. 1907; re-en. Sec. 11148, R. C. M. 1921. Collateral References
Obscenity©=17.
67 C.J.S. Obscenity § 7.

94-3616. (11148.1) Contraceptives, sex-inciting devices, articles for prevention of venereal disease, sale or disposal of, prohibited, when. It shall be unlawful for any person, firm, corporation, copartnership, or association to sell, offer for sale, or give away, through the medium of vending machines, personal or collective distribution, by solicitation, peddling or in any other manner whatsoever, contraceptive devices, prophylactic rubber goods, articles for the prevention of venereal diseases, and other infections, or any sex-inciting devices or contrivance in the state of Montana. The foregoing provisions shall not apply to regularly licensed practitioners of medicine, osteopathy or other licensed persons practicing other healing arts, and registered pharmacists of the state of Montana, nor to wholesale drug jobbers or manufacturers who sell to the retail stores only.

History: En. Sec. 1, Ch. 134, L. 1935.

Collateral References

Abortion \$\iiin 1. 1 C.J.S. Abortion \$ 44 et seq. 1 Am. Jur. 133, Abortion, §\$ 5, 6. Revocation of license of physician or surgeon because of giving information as to contraception. 82 ALR 1186.

Validity of regulations as to contraceptives or the dissemination of birth control information, 96 ALR 2d 955.

94-3617. (11148.2) Contraceptives and prophylactics, advertising of, forbidden. It shall be unlawful to exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place other than in the place of business of a licensed pharmacist, or to advertise such in any magazine, newspaper or other form of publication, originating in, or published within the state of Montana; to publish, or distribute from house to house or upon the streets, any circular, booklet or other form of advertising, or by other visual means, or by auditory method or by radio broadcast; or by the use of outside signs on stores, billboards,

window displays or other advertising visible to persons upon the streets or public highways; provided, however, that nothing in this act shall prevent the advertising of prophylactics or contraceptives in the trade press of those magazines whose principal circulation is to the medical and pharmaceutical professions; or to those magazines and other publications having interstate circulation, originating outside of the state of Montana where the advertising does not violate any United States law or federal postal regulation; nor to the furnishing within the store or place of business of a licensed pharmacist, to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this act.

History: En. Sec. 2, Ch. 134, L. 1935.

Collateral References Abortion 2. 1 C.J.S. Abortion §§ 12, 44 et seq.

94-3618. (11148.3) Seizure of illegal stock authorized. Any officer of the law shall have the power to cause the arrest of any person violating any provisions of this act; to seize stocks so illegally held, and to make seizure of any mechanical device or vending machine containing any merchandise coming within the provisions of this act, holding the owner of such machine, the occupier and the owner of the premises where seizure is made, to be in violation of this act.

History: En. Sec. 3, Ch. 134, L. 1935.

94-3619. (11148.4) Penalty for violation of act. Any person, or any member of a firm, or copartnership, or the officers of a corporation or association who, or which knowingly violates any of the provisions of this act shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not to exceed five hundred dollars (\$500.00), or by imprisonment of, not to exceed six (6) months in the county jail, or both; provided, however, that the justice of the peace courts and the district courts of the state shall have concurrent jurisdiction in all prosecutions and causes arising under this act.

History: En. Sec. 4, Ch. 134, L. 1935.

CHAPTER 37

PAWNBROKERS—PROHIBITIONS

Section 94-3701. Pawnbroker—doing business without license. 94-3702. Failure to keep register. 94-3703. Rate of interest. 94-3704. Failure to produce register for inspection.

94-3701. (11184) Pawnbroker—doing business without license. Every person who carries on the business of a pawnbroker by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent per annum, except by authority of a license, is guilty of a misdemeanor.

History: En. Sec. 620, Pen. C. 1895; re-en. Sec. 620, Ch. 54, L. 1903; re-en. Sec. 8437, Rev. C. 1907; re-en. Sec. 11184, R. C. M. 1921. Cal. Pen. C. Sec. 338.

Cross-Reference

Pawnbroker's license, secs. 66-1601, 84-3201.

Collateral References

Pawnbrokers and Money Lenders 11. 70 C.J.S. Pawnbrokers §§ 3, 15. 40 Am. Jur. 691 et seq., Pawnbrokers

and Moneylenders, § 3 et seq.

Failure to procure occupational or business license or permit as affecting validity or enforceability of contract. 30 ALR 834, 876; 42 ALR 1226 and 118 ALR 646.

94-3702. (11185) Failure to keep register. Every person who carries on the business of a pawnbroker, dealer in second-hand goods, or junk dealer who fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, or an accurate description of the property pledged or sold to him or by him, or the name and residence of the pledger or seller or purchaser, or to deliver to the pledger or seller or purchaser a written copy of such entry, or to keep an account in writing of all sales or purchases made by him, and every pawnbroker, dealer in second-hand goods, or junk dealer who receives goods in pledge or by gift, or purchases the same from any person under the age of twenty-one years, or from anybody acting as agent for said person, shall be deemed guilty of a misdemeanor, and a conviction thereof shall also work a forfeiture of his license.

History: En. Sec. 621, Pen. C. 1895; re-en. Sec. 621, Ch. 54, L. 1903; re-en. Sec. 8438, Rev. C. 1907; re-en. Sec. 11185, R. C. M. 1921. Cal. Pen. C. Sec. 339.

Collateral References

Pawnbrokers and Money Lenders 2. 70 C.J.S. Pawnbrokers § 2. 40 Am. Jur. 693, Pawnbrokers and Moneylenders, § 6.

94-3703. (11186) Rate of interest. Every pawnbroker who charges or receives interest at the rate of more than three per cent per month, or who, by charging commission, discount, storage, or other charge, or by compounding, increases or attempts to increase such interest, is guilty of a misdemeanor.

History: En. Sec. 622, Pen. C. 1895; re-en. Sec. 622, Ch. 54, L. 1903; re-en. Sec. 8439, Rev. C. 1907; re-en. Sec. 11186, R. C. M. 1921, Cal. Pen. C. Sec. 340.

Cross-Reference

Pawnbrokers, interest, sec. 66-1601.

Collateral References

Pawnbrokers and Money Lenders €= 6. 70 C.J.S. Pawnbrokers § 5. 40 Am. Jur. 693, Pawnbrokers and Moneylenders, § 6.

94-3704. (11187) Failure to produce register for inspection. Every pawnbroker, dealer in second-hand goods, or junk dealer who fails, refuses, or neglects to produce for inspection his register, or to exhibit the articles received by him in pledge, or sold to him, or his account of sales and purchases, to any officer holding a warrant authorizing him to search for personal property, or the order of a committing magistrate directing such officer to inspect such register or examine such articles or accounts of sales or purchases, is guilty of a misdemeanor.

History: En. Sec. 623, Pen. C. 1895; 8440, Rev. C. 1907; re-en. Sec. 11187, R. amd. Sec. 623, Ch. 54, L. 1903; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 343.

CHAPTER 38

PERJURY—SUBORNATION OF PERJURY

Section 94-3801. Perjury defined. 94-3802. Oath defined. 94-3803. Oath of office. 94-3804. Witnesses before legislative assembly.

Penalty for testifying falsely. Irregularity in administering oath. 94-3805.

94-3806. Incompetency of witness no defense. 94-3807.

Knowledge of materiality of testimony not necessary. Making depositions, etc., when deemed complete. 94-3808. 94-3809.

Statement of that which one does not know to be true.

Punishment of perjury. 94-3811.

Subornation of perjury. 94-3812.

Procuring the execution of innocent person. 94-3813.

94-3801. (10878) Perjury defined. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which an oath may by law be administered, willfully and contrary to such eath, states as true any material matter which he knows to be false, is guilty of perjury.

History: Earlier acts were Sec. 89, p. 198, Bannack Stat.; re-en. Sec. 101, p. 292, Cod. Stat. 1871; re-en. Sec. 101, 4th Div. Rev. Stat. 1879; re-en. Sec. 109, 4th Div. Comp. Stat. 1887.

This section en. Sec. 240, Pen. C. 1895; re-en. Sec. 8234, Rev. C. 1907; re-en. Sec. 10878, R. C. M. 1921. Cal. Pen. C. Sec. 118.

Cross-References

Absent voters' law, false oaths, sec. 23-3717.

Corrupt Practices Act, penalty, sec. 94-

Driver's license act, false affidavit, sec. 31-154.

False oath by officer, penalty, sec. 25-222.

False swearing before election judge, sec. 75-1619.

Pleading in formation, sec. 94-6419.

Must Relate to a Material Matter

Under this section, the giving of false testimony does not constitute perjury unless the alleged false testimony related to a material matter. State v. Hall, 88 M 297, 303, 292 P 734.

Under a charge of perjury based on alleged false testimony given by defend-ant in a murder trial as to when on the day after the homicide he arrived in the town where the crime had been committed, held, that, conceding that anything so connected with the matter at issue as to have a legitimate tendency to prove or disprove some material issue by giving weight or probability to, or detracting from, the testimony of a witness is material, and that if testimony is circumstantially material it is sufficient to sustain a perjury charge; the testimony in question was wholly immaterial to the homicide case and therefore conviction of defendant was not supported by the evidence. State v. Hall, 88 M 297, 303, 292 P 734.

The fact that testimony conflicts with that of another witness who testified to a material matter does not make the evidence material within the meaning of this section, when otherwise immaterial. State v. Hall, 88 M 297, 303, 292 P 734.

Operation and Effect

Held, that a recital in an affidavit for a search warrant, "I personally saw a keg of intoxicating beverages in said barn," without disclosing the means employed by affiant for ascertaining the contents of the keg, was a statement of fact for the making of which, if untrue, a charge of perjury could be lodged against him, and therefore sufficient, if believed by the magistrate, to show probable cause for the issuance of the warrant. (Mr. Justice Galen dissenting.) State ex rel. Baracker v. District Court, 75 M 476, 479, 244 P 280.

Sufficiency of Charge

An information charging perjury as having been committed in swearing at a criminal trial that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, held sufficient, where any person of ordinary intelligence could not, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon; nor was it rendered insufficient by the ungrammatical use of the word "knowing" where "knowingly" should have been employed. State v. Jackson, 88 M 420, 430, 293 P 309.

If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. State v. Jackson, 88 M 420, 430, 293 P 309.

Sufficiency of Evidence

Where the testimony of an attorney, charged with perjury, that at the time he gave certain testimony he did not know the statement made was false but firmly believed it to be true, giving plausible reasons for the statement, the finding of the referee, in view of the favorable position occupied by him in seeing the witness and hearing him testify, that the charge was not supported by the evidence, cannot be said on review to have been erroneous. In re McCue, 80 M 537, 552, 261 P 341.

Venue

Where prosecution for perjury is founded upon a false affidavit which was notarized in Lake County and delivered to Lewis and Clark County, apparently by mail, by virtue of section 94-3809, the crime was completed when the affidavit left the defendant with the requisite intent. If upon having the affidavit notarized the defendant then gave it to some other person to mail or mailed it himself, then the crime was committed and the proper county for venue was Lake County and not Lewis and Clark County. State v. Rother, 130 M 357, 303 P 2d 393, (Dissenting opinions, 130 M 357, 303 P 2d 393, at 397 and 409.)

Collateral References

False statement made under fear or compulsion as perjury. 4 ALR 1319.

Privilege against self incrimination as affecting admissibility in prosecution for perjury of testimony given before grand jury. 27 ALR 151.

Offense of perjury as affected by question relating to jurisdiction of court before which testimony was given. 82 ALR 1127.

Evidence, admissibility in prosecution for perjury of judgment in civil case. 87 ALR 1267.

Perjury as predicated upon statements upon application for marriage license. 101 ALR 1263.

Oath taken in pursuance of administrative requirement as predicate for criminal offense of perjury. 108 ALR 1240.

Actionability of conspiracy to give, or to procure the giving of, false testimony. 139 ALR 469.

Recantation as defense in perjury prosecution. 64 ALR 2d 276.

Contempt, perjury or false swearing as. 89 ALR 2d 1258.

Dismissal of action, because of party's perjury or suppression of evidence. 11 ALR 3d 1153.

94-3802. (10879) Oath defined. The term "oath," as used in the last section, includes an affirmation and every mode authorized by law of attesting the truth of that which is stated.

History: En. Sec. 241, Pen. C. 1895; re-en. Sec. 8235, Rev. C. 1907; re-en. Sec. 10879, R. C. M. 1921. Cal. Pen. C. Sec. 119.

Collateral References

Perjury № 1. 70 C.J.S. Perjury § 1. 41 Am. Jur. 10, Perjury, § 15.

94-3803. (10880) Oath of office. So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections.

History: En. Sec. 242, Pen. C. 1895; re-en. Sec. 8236, Rev. C. 1907; re-en. Sec. 10880, R. C. M. 1921, Cal. Pen. C. Sec. 120.

Collateral References
Perjury \$\infty\$8.
70 C.J.S. Perjury \$ 6.

94-3304. (10881) Witnesses before legislative assembly. Every person appearing before a committee of either house of the legislature for the purpose of testifying before, or giving or furnishing information to, such committee, with reference to any matter then pending before such committee, shall, upon the request of such committee, take an oath or affirmation, which such oath or affirmation shall be administered by the chairman, or acting chairman of such committee, and shall be in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you

shall give in the matter now pending before this committee, shall be the truth, the whole truth, and nothing but the truth, so help you God."

History: En. Sec. 1, Ch. 7, L. 1917; re-en. Sec. 10881, R. C. M. 1921.

94-3805. (10882) Penalty for testifying falsely. Every person who, having taken the oath or affirmation required by the preceding section, knowingly or willfully, and contrary to such oath or affirmation, states as true any material matter which he knows to be false, is guilty of perjury.

History: En. Sec. 2, Ch. 7, L. 1917; re-en. Sec. 10882, R. C. M. 1921.

Collateral References

Perjury \$3 et seq. See generally, 41 Am. Jur. 1, Perjury.

Perjury as predicated upon statements upon application for marriage license, 101 ALR 1263.

False statement made under fear or compulsion as perjury. 4 ALR 1319. Recantation as defense in perjury prosecution, 64 ALR 2d 276.

94-3806. (10883) Irregularity in administering oath. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

History: En. Sec. 243, Pen. C. 1895; re-en. Sec. 8237, Rev. C. 1907; re-en Sec. 10883, R. C. M. 1921. Cal. Pen. C. Sec. 121.

Collateral References

Perjury \$24.
70 C.J.S. Perjury \$24.
41 Am. Jur. 28, Perjury, §51.

94-3807. (10884) Incompetency of witness no defense. It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate.

History: En. Sec. 244, Pen. C. 1895; re-en. Sec. 8238, Rev. C. 1907; re-en. Sec. 10884, R. C. M. 1921. Cal. Pen. C. Sec. 122.

Collateral References

Perjury ₹ 27 et seq. 41 Am. Jur. 28, Perjury § 27 et seq. 41 Am. Jur. 28, Perjury, § 51.

94-3808. (10885) Knowledge of materiality of testimony not necessary. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

History: En. Sec. 245, Pen. C. 1895; re-en. Sec. 8239, Rev. C. 1907; re-en. Sec. 10885, R. C. M. 1921. Cal. Pen. C. Sec. 123.

Collateral References

Perjury \$ 9 et seq. 41 Am. Jur. 28, Perjury, § 51.

94-3809. (10886) Making depositions, etc., when deemed complete. The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

History: En. Sec. 246, Pen. C. 1895; re-en. Sec. 8240, Rev. C. 1907; re-en. Sec. 10886, R. C. M. 1921. Cal. Pen. C. Sec. 124.

Crime-When Complete

Under this section the crime of perjury is complete when the instrument is delivered by the accused to "any other person, with the intent that it be uttered or published as true." State v. Rother, 130 M 357, 303 P 2d 393, 395. (Dissenting opinions, 130 M 357, 303 P 2d 393 at 397, 409.)

Venue

Where prosecution for perjury is founded upon a false affidavit which was notarized in Lake County and delivered to Lewis and Clark County, apparently by mail, by virtue of this section the crime was completed when the affidavit left the defendant with the requisite intent. If

upon having the affidavit notarized the defendant then gave it to some other person to mail or mailed it himself, then the crime was committed and the proper county for venue was Lake County and not Lewis and Clark County. State v. Rother, 130 M 357, 303 P 2d 393. (Dissenting opinions, 130 M 357, 303 P 2d 393 at 397, 409.)

Collateral References

Perjury \$24.

94-3810. (10887) Statement of that which one does not know to be true. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

History: En. Sec. 247, Pen. C. 1895; re-en. Sec. 8241, Rev. C. 1907; re-en. Sec. 10887, R. C. M. 1921. Cal. Pen. C. Sec. 125.

Instructions

Perjury consisting not merely of swearing to some material statement which is not true, but in willfully, intentionally and corruptly falsifying under oath, an instruction (given after one embodying the words of this section, that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false), that the issue in such a prosecution is whether defendant knowingly or willfully made a false answer, and that if the answer was in fact untrue but was made in good faith and in the belief of its truth, conviction could not follow, held not in conflict with, but supplementing,

the one preceding it. State v. Jackson, 88 M 420, 431, 293 P 309.

Held, that where the trial court in a prosecution for perjury had instructed the jury in the words of this section, stating the abstract proposition that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false, and at the request of defendant followed it with one explaining it, its action in thereafter withdrawing the latter under the circumstances set forth in this case was error. State v. Jackson, 88 M 420, 431, 293 P 309.

Collateral References

Perjury \$2.
70 C.J.S. Perjury \$8.
41 Am. Jur. 7, Perjury, §8.

94-3811. (10888) Punishment of perjury. Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 248, Pen. C. 1895; re-en. Sec. 8242, Rev. C. 1907; re-en. Sec. 10888, R. C. M. 1921. Cal. Pen. C. Sec. 126. Collateral References
Perjury 41.
70 C.J.S. Perjury § 78.

94-3812. (10889) Subornation of perjury. Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

History: En. Sec. 249, Pen. C. 1895; re-en. Sec. 8243, Rev. C. 1907; re-en. Sec. 10889, R. C. M. 1921, Cal. Pen. C. Sec. 127.

Collateral References

Perjury № 13.
70 C.J.S. Perjury § 79 et seq.
41 Am. Jur. 40 et seq., Perjury, § 74 et seq.

Entrapment to commit offense of subornation of perjury. 18 ALR 191; 66 ALR 508 and 86 ALR 273.

Actionability of conspiracy to give, or to procure the giving of, false testimony. 139 ALR 469.

94-3813. (10890) Procuring the execution of innocent person. ery person who, by willful perjury, or subornation of perjury, procures the conviction and execution of any innocent person, is punishable by death.

History: En. Sec. 90, p. 198, Bannack Stat.; amd. Sec. 102, p. 292, Cod. Stat. 1871; re-en. Sec. 102, 4th Div. Rev. Stat. 1879; re-en. Sec. 110, 4th Div. Comp. Stat.

1887; amd. Sec. 250, Pen. C. 1895; re-en. Sec. 8244, Rev. C. 1907; re-en. Sec. 10890, R. C. M. 1921. Cal. Pen. C. Sec. 128.

CHAPTER 39

PUBLIC OFFICERS-OFFENSES BY

Section 94-3901. Acting in a public capacity without having qualified.

Acts of officers de facto not affected. 94-3902.

94-3903. Giving or offering bribes to executive officers.

94-3904. Asking or receiving bribes.

94-3905. Resisting officers.

94-3906. Extortion.

94-3907. Officers illegally interested in contracts.

94-3908. Presenting fraudulent bills or claims for allowance or payment.

94-3909. Buying appointments to office.

94-3910. Taking rewards for deputation. 94-3911. Exercising functions of office wrongfully. 94-3912. Refusal to surrender books, etc., to successor.

94-3913. Applicability of chapter to administrative and ministerial officers.

94-3914. False certificates by public officers.

94-3915. Officer refusing to receive or arrest parties charged with crime.

94-3916. Delaying to take person arrested before a magistrate.

94-3917. Inhumanity to prisoners.

Confessions obtained by duress or inhuman practices. 94-3918.

Violation of law a misdemeanor-penalty. 94-3919.

94-3920. Importing persons to discharge duties of peace officers prohibited.

94-3901. (10821) Acting in a public capacity without having qualified. Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor.

History: En. Sec. 130, Pen. C. 1895; re-en. Sec. 8176, Rev. C. 1907; re-en. Sec. 10821, R. C. M. 1921. Cal. Pen. C. Sec. 65.

Collateral References

Officers@36, 37. 67 C.J.S. Officers §§ 37-39. 43 Am. Jur. 126, Public Officers, § 327.

(10822) Acts of officers de facto not affected. The last section does not affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

History: En. Sec. 131, Pen. C. 1895; re-en. Sec. 8177, Rev. C. 1907; re-en. Sec. 10822, R. C. M. 1921. Cal. Pen. C. Sec. 66. Collateral References Officers 39 et seq., 104. 67 C.J.S. Officers §§ 4, 135 et seq.

94-3903. (10823) Giving or offering bribes to executive officers. Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state.

History: En. Sec. 132, Pen. C. 1895; re-en. Sec. 8178, Rev. C. 1907; re-en. Sec. 10823, R. C. M. 1921. Cal. Pen. C. Sec. 67.

Collateral References
Bribery € 1 (2), 16.
11 C.J.S. Bribery §§ 3, 20.
12 Am. Jur. 2d 755, Bribery, § 12.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-3904. (10824) Asking or receiving bribes. Every executive officer or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 133, Pen. C. 1895; re-en. Sec. 8179, Rev. C. 1907; re-en. Sec. 10824, R. C. M. 1921, Cal. Pen. C. Sec. 68.

Operation and Effect

To charge an officer (a sheriff) with bribery under this section, the accusation must allege that defendant had asked, received or agreed to receive the bribe upon an understanding that his official action should be influenced thereby; hence a charge that the briber gave the officer money with intent to influence the latter's official action, while sufficient to charge bribery against the giver, was insufficient to charge the offense against the accused, and therefore insufficient to charge him with willful or corrupt malfeasance in office. State ex rel. Beazley v. District Court, 75 M 116, 119, 120, 241 P 1075.

Collateral References

Bribery 27, 64. 11 C.J.S. Bribery §§ 3, 7; 67 C.J.S. Officers §§ 24, 57.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

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Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323

94-3905. (10825) Resisting officers. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 134, Pen. C. 1895; re-en. Sec. 8180, Rev. C. 1907; re-en. Sec. 10825, R. C. M. 1921. Cal. Pen. C. Sec. 69.

Collateral References

Obstructing Justice 7. 67 C.J.S. Obstructing Justice § 5.

39 Am. Jur. 508 et seq., Obstructing Justice, §§ 12 et seq.

Dispute over custody as affecting charge of obstructing or resisting arrest. 3 ALR 1290.

What constitutes offense of obstructing or resisting officer. 48 ALR 746.

94-3906. (10826) Extortion. Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any

promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

History: En. Sec. 135, Pen. C. 1895; re-en. Sec. 8181, Rev. C. 1907; re-en. Sec. 10826, R. C. M. 1921. Cal. Pen. C. Sec. 70.

Collateral References

Extortion ≈ 1. 35 C.J.S. Extortion § 1. 31 Am. Jur. 2d 902 et seq., Extortion, Blackmail, and Threats, § 3 et seq.

94-3907. (10827) Officers illegally interested in contracts. Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the county jail or state prison not more than five years, and is forever disqualified from holding any office in this state.

History: En. Sec. 136, Pen. C. 1895; re-en. Sec. 8182, Rev. C. 1907; re-en. Sec. 10827, R. C. M. 1921. Cal. Pen. C. Sec. 71.

Contracts Voidable

While this section provides severe punishment for a violation of the provisions of code sections (sections 59-501 to 59-503) prohibiting city officials from entering into contracts of sale of goods to the city in which they are interested, their guilt may not be presumed in advance of a fair trial, and contracts made in violation of said sections are not absolutely void but only voidable by parties other than by the officer unlawfully entering into them, particularly where this section preseribed a penalty for violation by the offending officer. Grady v. City of Livingston, 115 M 47, 55, 61, 141 P 2d 346.

Police Captain as "Officer"

A police captain is an "officer," within the meaning of this section and section 59-504 making the purchase of a city warrant by city officers a crime punishable by disqualification from holding office, and the fact that the accused bought the warrant for a brother officer is unavailing as a defense. State ex rel. O'Brien v. Mayor of Butte, 54 M 533, 537, 172 P 134.

Sufficiency of Evidence

Evidence held to be insufficient to sustain a conviction in a prosecution for purchasing evidences of indebtedness against the county, contrary to this section. State v. Danzer, 35 M 269, 272, 88 P 952.

Collateral References

Officers 110. 67 C.J.S. Officers § 116. 43 Am. Jur. 128, Public Officers, § 328.

Relation as creditor of contracting party as constituting interest within statute against public officer being interested in public contract. 73 ALR 1352.

Relationship as disqualifying interest within statute making it unlawful for an officer to be interested in a public contract. 74 ALR 792.

94-3908. (10828) Presenting fraudulent bills or claims for allowance or payment. Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony.

History: En. Sec. 137, Pen. C. 1895; re-en. Sec. 8183, Rev. C. 1907; re-en. Sec. 10828, R. C. M. 1921. Cal. Pen. C. Sec. 72.

Operation and Effect

An information may be drawn consistent with section 94-1805 (obtaining money under false pretenses) which is not vulnerable to the objection that it is bad for duplicity for charging an offense under this section. State v. Hale, 129 M 449, 291

P 2d 229, 234. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236), distinguished in 135 M 449, 453, 340 P 2d 157, 160, overruled on another point in State v. Bogue, 142 M 459, 462, 384 P 2d 749.

Collateral References

Fraud \$\infty\$ 68.
2 C.J.S. Agency § 10; 37 C.J.S. Fraud § 154.

94-3909. (10829) Buying appointments to office. Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor.

History: En. Sec. 138, Pen. C. 1895; re-en. Sec. 8184, Rev. C. 1907; re-en. Sec. 10829, R. C. M. 1921. Cal. Pen. C. Sec. 73.

94-3910. (10830) Taking rewards for deputation. Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

History: Ap. p. Sec. 114, p. 205, Bannack Stat.; re-en. Sec. 127, p. 298, Cod. Stat. 1871; re-en. Sec. 127, 4th Div. Rev. Stat. 1879; re-en. Sec. 136, 4th Div. Comp.

Stat. 1887; amd. Sec. 139, Pen. C. 1895; re-en. Sec. 8185, Rev. C. 1907; re-en. Sec. 10830, R. C. M. 1921. Cal. Pen. C. Sec. 74.

94-3911. (10831) Exercising functions of office wrongfully. Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, willfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor.

History: Ap. p. Sec. 110, p. 204, Bannack Stat.; re-en. Sec. 124, p. 298, Cod. Stat. 1871; re-en. Sec. 124, 4th Div. Rev. Stat. 1879; re-en. Sec. 133, 4th Div. Comp. Stat. 1887; amd. Sec. 140, Pen. C. 1895; re-en. Sec. 8186, Rev. C. 1907; re-en. Sec. 10831, R. C. M. 1921. Cal. Pen. C. Sec. 75.

Collateral References
Officers 88, 87, 89.
67 C.J.S. Officers § 80, 82.

67 C.J.S. Officers §§ 80, 82. 43 Am. Jur. 129, Public Officers, § 329.

94-3912. (10832) Refusal to surrender books, etc., to successor. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, willfully and unlawfully withholds or detains from his successor, or other person entited thereto, the records, papers, documents, or other writings appertaining or belonging to his office, or wrongfully refuses to surrender the official seal, or mutilates, destroys, or takes away the same, is guilty of a misdemeanor, and is punishable by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both.

History: Ap. p. Sec. 96, p. 200, Bannack Stat. re-en. Sec. 108, p. 294, Cod. Stat. 1871; re-en. Sec. 108, 4th Div. Rev. Stat. 1879; re-en. Sec. 116, 4th Div. Comp. Stat. 1887; amd. Sec. 141, Pen. C. 1895; re-en. Sec. 8187, Rev. C. 1907; re-en. Sec. 10832, R. C. M. 1921. Cal. Pen. C. Sec. 76.

Collateral References
Officers \$89.
67 C.J.S. Officers \$82.

94-3913. (10833) Applicability of chapter to administrative and ministerial officers. The various provisions of this chapter apply to administra-

tive and ministerial officers, in the same manner as if they were mentioned therein.

History: En. Sec. 142, Pen. C. 1895; re-en. Sec. 8188, Rev. C. 1907; re-en. Sec. 10833, R. C. M. 1921. Cal. Pen. C. Sec. 77.

94-3914. (10945) False certificates by public officers. Every public officer or board authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor.

History: En. Sec. 294, Pen. C. 1895; re-en. Sec. 8276, Rev. C. 1907; re-en. Sec. 10945, R. C. M. 1921, Cal. Pen. C. Sec. 167.

Collateral References Officers@=121. 67 C.J.S. Officers § 133.

94-3915. (10916) Officer refusing to receive or arrest parties charged with crime. Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 107, p. 203, Bannack Stat.; re-en. Sec. 119, p. 296, Cod. Stat. 1871; re-en. Sec. 119, 4th Div. Rev. Stat. 1879; re-en. Sec. 128, 4th Div. Comp. Stat. 1887; amd. Sec. 270, Pen. C. 1895; re-en. Sec. 8252, Rev. C. 1907; re-en. Sec. 10916, R. C. M. 1921. Cal. Pen. C. Sec. 142.

Collateral References

Coroners 25; Officers 121; Sheriffs and Constables 153.

18 C.J.S. Coroners § 31; 67 C.J.S. Officers § 133; 80 C.J.S. Sheriffs and Constables

94-3916. (10920) Delaying to take person arrested before a magistrate. Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor,

History: En. Sec. 274, Pen. C. 1895; re-en. Sec. 8256, Rev. C. 1907; re-en. Sec. 10920, R. C. M. 1921. Cal. Pen. C. Sec. 145. Collateral References Arrest@=70. 6 C.J.S. Arrest § 17.

94-3917. (10922) Inhumanity to prisoners. Every officer who is found guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding two thousand dollars, and by removal from office.

History: En. Sec. 95, p. 200, Bannack Stat.; amd. Sec. 107, p. 294, Cod. Stat. 1871; re-en. Sec. 107, 4th Div. Rev. Stat. 1879; re-en. Sec. 115, 4th Div. Comp. Stat. 1887; amd. Sec. 276, Pen. C. 1895; re-en. Sec. 8258, Rev. C. 1907; re-en. Sec. 10922, R. C. M. 1921. Cal. Pen. C. Sec. 147.

Collateral References

Officers 66, 121; Prisons 13; Sheriffs

and Constables 13, 153. 67 C.J.S. Officers § 133; 72 C.J.S. Prisons § 15; 80 C.J.S. Sheriffs and Constables §§ 10, 18, 26, 209.

41 Am. Jur. 891 et seq., Prisons and Prisoners, § 9 et seq.

Liability for medical or surgical services to prisoners. 44 ALR 1285.

Liability for death of or injury to prisoner. 46 ALR 94; 50 ALR 268 and 61 ALR 569.

Constitutionality of statutes in relation to treatment or discipline of convicts. 50 ALR 104.

Civil liability of peace officers for negligence causing death of or injury to prisoner. 61 ALR 571.

Mistreatment of prisoner as ground for removal of sheriff or other police officer. 100 ALR 1401.

94-3918. (10923) Confessions obtained by duress or inhuman practices. It shall be unlawful for any sheriff, constable, police officer, or any persons charged with the custody of any one accused of crime, of whatever nature, or with the violation of a municipal ordinance, to frighten or attempt to frighten by threats, torture, or attempt to torture, or resort to any means of an inhuman nature, or pactice what is commonly known as the "third degree" in order to secure a confession from such person.

History: En. Sec. 1, Ch. 89, L. 1911; re-en. Sec. 10923, R. C. M. 1921.

Confession Not Used in Proceedings

Where defendant's confession to murder was not introduced before the court at any stage in the proceedings, he was not allowed to withdraw his plea of guilty on the grounds that the confession was obtained from him illegally. Petition of Pine, 143 M 453, 391 P 2d 690.

Drugs

Where a sedative was given to a wounded defendant about an hour before he signed a confession to murder charge, the administration of the sedative did not make the confession ipso facto inadmissible and the determining question was

whether at the time of the confession it was made voluntarily and of his free will. State v. Noble, 142 M 284, 384 P 2d 504.

Where Written Confession Used for Impeachment

Where one of two defendants charged with grand larceny gave the county attorney a written statement which was used on cross-examination for purposes of impeachment, upon contention that a proper foundation had not been laid for its admission in evidence, held, that the statement not having been used as a confession, but for purpose of impeachment, the state was not required to show that it had been voluntarily made. State v. Fisher, 108 M 68, 72, 88 P 2d 53.

94-3919. (10924) Violation of law a misdemeanor—penalty. A violation of the provisions of the preceding section shall constitute a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 89, L. 1911; re-en. Sec. 10924, R. C. M. 1921.

94-3920. (10925) Importing persons to discharge duties of peace officers prohibited. It shall be unlawful for any person or persons, company, association, or corporation to bring or import into this state, or to in anywise aid in bringing or importing into this state, any person or persons, or association of persons, for the purpose of discharging the duties devolving upon sheriffs, deputy sheriffs, marshals, policemen, or constables or peace officers in the protection or preservation of public or private property, or in the punishment of any person violating the criminal laws of this state.

History: En. Sec. 4599, Pol. C. 1895; re-en. Sec. 3125, Rev. C. 1907; re-en. Sec. 10925, R. C. M. 1921.

Operation and Effect

This section did not change the common-law rule respecting a sheriff's liability in damages. Annala v. McLeod, 122 M 498, 206 P 2d 811, 815.

CHAPTER 40

POOL HALLS—BILLIARD HALLS—BOWLING ALLEYS—PROHIBITIONS GOVERNING

Section 94-4001. Conducting certain pool games a misdemeanor. 94-4002. Conducting certain pool games a misdemeanor—playing games—punishment for. 94-4003. Closing hour for pool halls, billiard halls and bowling alleys. 94-4004. Penalty for permitting minors in pool or billiard hall. 94-4005. Penalty for violation of act.

94-4001. (11188) Conducting certain pool games a misdemeanor. Any owner, proprietor, manager, or employee who permits, or any person who carries on, or conducts, or causes to be conducted or runs, as principal, agent, or employee, any game of pea pool, pay pool, Kelly pool, or any other billiard-table, for money, checks, credits, or any representative of value, billiard-table, for money, checks, credits, or any representative of value, shall be deemed to be guilty of a misdemeanor and punished as provided in

History: En. Sec. 1, Ch. 29, L. 1917; re-en. Sec. 11188, R. C. M. 1921.

Collateral References Gaming \$\infty 74 (5). 38 C.J.S. Gaming §§ 1, 96, 98. 38 Am. Jur. 2d 138, Gambling, § 43.

(11189) Conducting certain pool games a misdemeanor—playing games—punishment for. Any person who shall participate as a player in the games prohibited by this act shall be deemed guilty of a violation thereof and punished as provided in this act.

History: En. Sec. 2, Ch. 29, L. 1917; re-en. Sec. 11189, R. C. M. 1921.

Collateral References Gaming \$\infty 79 (1). 38 C.J.S. Gaming §§ 83, 99, 101. 38 Am. Jur. 2d 138, Gambling, § 43.

94-4003. (11190) Closing hour for pool halls, billiard halls and bowling alleys. All pool halls, billiard halls, bowling alleys, and other places of business where pool or billiards is played, shall be closed each night in the year at an hour not later than twelve o'clock, midnight, and shall be kept closed until seven o'clock the following morning; provided, however, that the provisions of this act shall not extend the hours of keeping open such resorts and places of business which by regulation of law or ordinance are required to be closed at an earlier hour than twelve o'clock, midnight.

History: En. Sec. 3, Ch. 29, L. 1917; re-en. Sec. 11190, R. C. M. 1921.

Collateral References Theaters and Shows 2.

86 C.J.S. Theaters and Shows § 58. 52 Am. Jur. 264, Theaters, Shows, Exhibitions, and Public Resorts, § 15.

(11191) Penalty for permitting minors in pool or billiard hall. Every owner, proprietor, manager, or employee of a pool or billiard hall who permits a minor under the age of eighteen years to play, resort, or stop therein, is guilty of a misdemeanor.

History: En. Sec. 4, Ch. 29, L. 1917; amd. Sec. 1, Ch. 115, L. 1921; re-en. Sec. 11191, R. C. M. 1921.

Collateral References Theaters and Shows 9. 86 C.J.S. Theaters and Shows § 58.

94-4005. (11192) Penalty for violation of act. Any person who shall violate any of the provisions of this act shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars, or by imprisonment of not more than six months, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 29, L. 1917; re-en. Sec. 11192, R. C. M. 1921.

94-4101

CHAPTER 41

RAPE AND OTHER SEXUAL CRIMES

Section 94-4101. Rape defined. 94-4102. When physical ability must be proved. Penetration sufficient. 94-4103. 94-4104. Punishment of rape. Abduction of women. 94-4105. 94-4106. Lewd and lascivious acts upon children. 94-4107. Open and notorious adultery and fornication. 94-4108. Seduction-penalty. Unconstitutional. 94-4109. 94-4110. Procuring women to reside in houses of prostitution or for immoral purposes a felony. Procuring women to reside in houses of prostitution or for immoral purposes a felony—procuring women for concubinage and other 94-4111. immoral purposes a felony. 94-4112. Receiving money for causing immoral acts of women a felony. 94-4113. Paying money for procuring women for immoral purposes a felony. Receiving money for procuring women for immoral purposes a felony. Unlawful restraint of women in houses of prostitution and elsewhere 94-4114. 94-4115. a felony. 94-4116. Accepting money from earnings of prostitute a felony.

Living with a common prostitute a felony. 94-4117.

94-4118. Crime against nature.

Penetration sufficient to complete the crime.

94-4120. Child under age of sixteen cannot be accomplice.

94-4101. (11000) Rape defined. Rape is an act of sexual intercourse, accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

- When the female is under the age of eighteen years.
- Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
- 3. Where she resists, but her resistance is overcome by violence or force.
- Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or other anesthetic substance, administered by or with the privity of the accused.
- 5. Where she is, at the time, unconscious of the nature of the act, and this is known to the accused.
- Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with the intent to induce such belief.

History: Ap. p. Sec. 43, p. 184, Bannack Stat.; re-en. Sec. 46, p. 277, Cod. Stat. 1871; re-en. Sec. 46, 4th Div. Rev. Stat. 1879; re-en. Sec. 46, 4th Div. Comp. Stat. 1887; amd. Sec. 450, Pen. C. 1895; re-en. Sec. 8336, Rev. C. 1907; amd. Sec. 1, Ch. 16, L. 1913; re-en. Sec. 11000, R. C. M. 1921. Cal. Pen. C. Sec. 261.

Civil Action for Alleged Assault to Commit Rape

In an action for damages for attempted rape the testimony of plaintiff should be considered in the light of all the attendant circumstances, as should also the question whether her subsequent conduct was the usual and natural conduct of an outraged woman as bearing upon the credibility of her direct testimony, such charges being easily made, often inspired by malice, hidden motives or revenge, and hard to disprove. Evidence in instant case held to have made for improbability of the occurrence, and insufficient, warranting reversal with directions to dismiss the action. Cullen v. Peschel, 115 M 187, 191, 142 P 2d 559.

Effect of Age of Prosecutrix

In a prosecution for rape under subdivision 1 of this section, (an act of sexual intercourse accomplished with a female under the age of 18 years), it is immaterial that she consented to the act, that defendant was ignorant of her age or that she misrepresented her age to him, or that she was lacking in chastity, or at the time was an inmate of a house of prostitution, nonage on her part being sufficient to warrant conviction. State v. Duncan, 82 M 170, 184, 266 P 400.

Evidence of Other Offenses

Where defendant was charged with attempted rape upon a female child under the age of 18 years, the admission of a transcribed statement in the form of questions by the county attorney and answers by the defendant showing that defendant had been warned about going out with girls under 18 and could have been charged with rape of a girl other than the prosecutrix, was prejudicial, was not waived by defendant's introduction of evidence to meet that of the state, and was of such nature that it could not be cured. State v. Tiedemann, 139 M 237, 362 P 2d 529, 532, distinguished in 144 M 401, 405, 396 P 2d 821.

Federal Law as to Indians

In the prosecution of an Indian for the crime of rape committed upon a 13-year-old female Indian on a reservation, an information which failed to charge that force had been employed or that consent of the victim was lacking failed to state an offense under the federal law which adopted the state law definition of rape. United States v. Rider, 282 F 2d 476.

Where an Indian was charged with rape of an Indian girl under 18 on a reservation, the indictment failed to state an offense under the federal statute (18 U. S. C. § 1153), providing that an Indian who commits rape as defined by state law shall be imprisoned at the discretion of the court, because "rape" does not include "carnal knowledge" as rape is defined in this section, and because the federal law distinguishes between rape and carnal knowledge. United States v. Red Wolf, 172 F Supp 168.

Partial Repeal

Since this section is repealed by implication by Laws of 1943, Ch. 227 (10-601 et seq.), and the amendments thereof, in so far as it is in conflict with the substance and intent thereof, district criminal court was prohibited from trying child under the age of 16 years charged with rape. He was solely under the exclusive jurisdiction of the juvenile court.

State ex rel. Dahl v. District Court, 134 M 395, 333 P 2d 495, 497, 499.

Statutory Rape

Any man who accomplishes an act of sexual intercourse with a female under the age of 18 years, when such female is not his wife, is guilty of the crime of statutory rape. The corpus delicti is sufficiently proved by the testimony of the prosecutrix that she had sexual intercourse with the accused at the time and place set forth in the information. State v. Reid, 127 M 552, 267 P 2d 986, 991.

Sufficiency of Evidence.

Where an information in a rape case charges defendant with carnal knowledge of a female under the statutory age of consent, violently, and against her will, and there is ample evidence that the female was under that age, it is not incumbent on the state to also prove that she resisted defendant's assault, and that he violently overcame her resistance, even though it has been so alleged. State v. Mahoney, 24 M 281, 285, 61 P 647.

Evidence held insufficient to justify a

Evidence held insufficient to justify a conviction for rape charged to have been accomplished by violence and force, but rather to show that the prosecuting witness failed to offer any physical resistance which it required force to overcome, within the meaning of subdivision 3 of this section. State v. Needy, 43 M 442, 444, 117 P 102.

To warrant conviction for an attempt to commit rape by force, the evidence must be sufficient to establish beyond a reasonable doubt that the defendant assaulted the prosecutrix with the intention to accomplish his purpose at all events and notwithstanding any resistance on her part; hence if intent in the mind of the assailant to overcome by force all resistance which might be offered is absent, defendant is entitled to an acquittal. State v. Hennessy, 73 M 20, 22, 234 P 1094.

Evidence adduced in a prosecution for an attempted rape by force reviewed and held insufficient to sustain a verdict of guilty, it presenting a case of urgent solicitation rather than of an intention by the use of force to overcome the resistance of the prosecutrix. State v. Hennessy, 73 M 20, 22, 234 P 1094.

Proof of indecency, immorality and grossly offensive and reprehensible conduct on the part of the defendant sufficient to constitute simple assault is alone insufficient to establish an attempt to commit rape by force. State v. Hennessy, 73 M 20, 22, 234 P 1094.

An information charging rape accomplished by violence and force, and against the will and consent of the prosecuting witness, is sufficient and warrants proof

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either of resistance overcome by violence or superior force, or of threats of a nature to excuse nonresistance. State v. Whitmore, 94 M 119, 121, 21 P 2d 58.

Sufficiency of Indictment or Information

In an indictment for rape, it is not necessary to allege that the female injured is not the wife of the defendant. State v. Williams, 9 M 179, 180, 23 P 335;

State v. Morrison, 46 M 84, 88, 125 P 649. An information for rape, alleging that the act was committed by force and against the will and consent of the female, is sufficient, under subdivisions 3 and 4 of this section, and authorizes proof that the act was committed under the circumstances provided for in either subdivision. State v. Morrison, 46 M 84, 88, 125 P 649.

Held, that there was no variance between an information charging the commission of rape by violence and force, and the evidence of the prosecutrix that she was rendered helpless by a blow in the face which stunned her prior to the commission of the offense, even though she was unconscious or semi-conscious during its commission; such proof of her condition as a reason for nonresistance bringing the case within subdivision 3 of this section, i.e., rape, where the resistance of the female is overcome by violence or force. State v. Whitmore, 94 M 119, 121, 21 P 2d 58.

"Unconscious" Defined

The term "unconscious" as used in subdivision 5 of this section, defining the crime of rape, held not to have reference to the loss of physical or mental faculties on the part of the female through assault and violence; that subdivision having to do only with a situation where she is unconscious of the nature of the act. State v. Whitmore, 94 M 119, 121, 21 P 2d 58.

When Force Is Immaterial

The question of force is immaterial where the prosecuting witness is under the statutory age of consent. State v. Bowser, 21 M 133, 141, 53 P 179.

Where Prosecutrix Impeached by Officers, and Confession Corroborated by Circumstances

Where defendant in a prosecution for rape virtually enticed prosecutrix from her home and placed her in a house of unsavory reputation, kept her there for three or four days and did not disclose her whereabouts to her father who was searching for her, and in addition made a confession, these circumstances and others held sufficient to prove the corpus delicti and sustain conviction, despite the fact that prosecutrix of tender years repudiated a prior statement to officers that she had sexual intercourse with defendant,

which the officers confirmed by impeaching testimony. State v. Traufer, 109 M 275, 284, 97 P 2d 336.

Collateral References

Rape = 1, 6, 9-13. 75 C.J.S. Rape § 1 et seq. See generally, 44 Am. Jur. 897, Rape.

Marriage subsequent to crime as bar to prosecution for rape. 9 ALR 339. Directing acquittal for insufficiency of

the evidence. 17 ALR 910.

"Infamous offense," rape as within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1016.

Impotency as defense to charge of rape or assault with intent to commit rape. 26

ALR 772.

Competency of prosecutrix as witness in prosecution for rape of feeble-minded female. 26 ALR 1502 and 148 ALR 1153.

Civil liability for carnal knowledge with actual consent of girl under age of consent. 45 ALR 780 and 79 ALR 1229.

Corroboration of prosecutrix under age of consent. 60 ALR 1129.

Cross-examination of prosecuting witness as to sexual morality. 65 ALR 421,

Age of consent, assault with intent to ravish consenting female under. 81 ALR 599

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feeble-minded or imbecile. 93 ALR 918.

Witness, admissibility of prior consistent statements of prosecutrix testifying as, where her testimony is impeached. 140 ALR 174 and 75 ALR 2d 961.

Bill of particulars to one accused of

rape. 5 ALR 2d 559.

Inclusion or exclusion of day of birth in computing age of prosecutrix. 5 ALR 2d 1153.

Exclusion of women from juries in prosecutions for rape. 9 ALR 2d 661.

Liability of parent or person in loco parentis for rape of minor child. 19 ALR

Entrapment to commit offense of assault with intent to rape. 52 ALR 2d 1194.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 ALR 2d 1017.

Physican and patient, applicability in criminal proceedings of privilege as to communications between. 7 ALR 3d 1458. Victim's age as defense to statutory

rape, mistake or lack of information as to. 8 ALR 3d 1100.

Psychiatric examination: requiring complaining witness in prosecution for sex crime to submit to psychiatric examination, 18 ALR 3d 1433.

Law Review

Reasonable Mistake as to the Age of the Prosecutrix is an Affirmative Defense to

a Charge of Statutory Rape (People v. Hernandez, 39 Cal Rptr 361, 393 P 2d 673), 26 Mont L Rev. 133 (1964).

94-4102. (11001) When physical ability must be proved. No conviction for rape can be had against one who was under the age of sixteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.

History: En. Sec. 48, 4th Div. Comp. Stat. 1887; re-en. Sec. 451, Pen. C. 1895; re-en. Sec. 8337, Rev. C. 1907; re-en. Sec. 11001, R. C. M. 1921. Cal. Pen. C. Sec. 262.

Partial Repeal

Laws 1943, Ch. 227 (10-601 et seq.), and the amendments thereof have repealed by implication this section and section 94-4101, in so far as they conflict with the substance and intent thereof and district criminal court was prohibited from trying child under the age of 16 years charged

with rape. He was solely under the exclusive jurisdiction of the juvenile court. State ex rel. Dahl v. District Court, 134 M 395, 333 P 2d 495, 497, 499.

Collateral References

Rape \$3.
75 C.J.S. Rape \$6.
44 Am. Jur. 919, Rape, § 31.

Impotency as defense to charge of rape, attempt to rape, or assault with attempt to commit rape. 23 ALR 3d 1351.

94-4103. (11002) Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.

History: En. Sec. 47, 4th Div. Comp. Stat. 1887; re-en. Sec. 452, Pen. C. 1895; re-en. Sec. 8338, Rev. C. 1907; re-en. Sec. 11002, R. C. M. 1921. Cal. Pen. C. Sec. 263.

Collateral References

Rape \$ 7. 75 C.J.S. Rape § 10. 44 Am. Jur. 902, Rape, § 3.

94-4104. (11003) Punishment of rape. Rape is punishable by imprisonment in the state prison not less than two nor more than ninety-nine years.

History: En. Sec. 8339, Rev. C. 1907; amd. Sec. 1, Ch. 10, L. 1909; re-en. Sec. 11003, R. C. M. 1921. Cal. Pen. C. Sec. 264.

Collateral References

Rape \$64. 75 C.J.S. Rape § 86.

94-4105. (11004) Abduction of women. Every person who takes any woman unlawfully, against her will, and by force, menace, or duress compels her to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in the state prison not less than two nor more than fourteen years.

History: Ap. p. Sec. 52, p. 186, Bannack Stat.; re-en. Sec. 52, p. 278, Cod. Stat. 1871; re-en. Sec. 52, 4th Div. Rev. Stat. 1879; re-en. Sec. 55, 4th Div. Comp. Stat. 1887; amd. Sec. 454, Pen. C. 1895; re-en. Sec. 8340, Rev. C. 1907; re-en. Sec. 11004, R. C. M. 1921. Cal. Pen. C. Sec. 265.

Collateral References Abduction = 1.

1 C.J.S. Abduction §§ 1-13, 15. See generally, 1 Am. Jur. 2d 159, Abduction and Kidnaping.

Forcing another to transport one as constituting offense of kidnaping or of abduction, 62 ALR 200.

Belief in legality of the act as affecting offense of abduction or kidnaping. 114 ALR 870.

94-4106. (11005) Lewd and lascivious acts upon children. Any person over the age of eighteen (18) years, who shall willfully and lewdly commit any lewd and lascivious act, other than the acts constituting other

crimes provided in sections 94-4101 to 94-4108, upon or with the body or any part or member thereof, of a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not exceeding twenty-five (25) years.

History: En. Sec. 1, Ch. 59 L. 1913; re-en. Sec. 11005, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1935; amd. Sec. 1, Ch. 57, L. 1959.

Constitutionality

The legislature has the power to prohibit the commission of lewd and lascivious acts upon children under certain ages, and contention that this section, defining and prescribing punishment for such offense is unconstitutional, held not meritorious. State v. Kocher, 112 M 511, 518, 119 P 2d 35.

Age as Defense

The portion of this section giving an exemption of prosecution to a person under the age of 18 years is a matter of defense, and negation thereof is not a necessary part of the information. State v. Davis, 141 M 197, 376 P 2d 727, 729.

Charge Held Sufficient

Information stating that the defendant "did then and there willfully, unlawfully, feloniously and lewdly place his hands upon the body and person of said (prosecutrix) and attempted to remove her dress, with the intent of then and there arousing, appealing to, and gratifying the lust, passion and sexual desires of said (prosecutrix) or of the defendant" held sufficient. State v. Kocher, 112 M 511, 514, 119 P 2d 35.

An information under this section was sufficient although it did not allege the age of the defendant. State v. Davis, 141 M 197, 376 P 2d 727, 729.

Elements of Crime

The elements of the crime prescribed by this section are, first, the offender must be over the age of 18 years, second, a lewd or lascivious act must have been committed upon or with the body, or any part or member thereof, of a child under the age of 16 years, the legislature by this provision evidently meaning a physi-

cal contact between the accused and the child (there need not be a "flesh to flesh" contact); and, third, the act must have been committed with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the accused or of the child. State v. Kocher, 112 M 511, 514, 119 P 2d 35.

Evidence of Similar Acts

Where alleged lewd and lascivious acts upon the person of a minor child below the age of 16 years were committed on or about March 19, 1955, it was improper to permit state to show similar acts to those charged as having been committed on August 4, 1951, and in June 1951 in the state of California because of the remoteness in time. State v. Nicks, 134 M 341, 332 P 2d 904, 905, 77 ALR 2d 836.

Subsequent Offense

A defendant convicted of a lewd and lascivious act upon a child under this section was properly sentenced to a term of not less than 10 years on a subsequest offense, pursuant to subdivision 1 of section 94-4713, where the jury found that he had previously been convicted of lewd and lascivious acts upon a child. In redavis' Petition, 139 M 622, 365 P 2d 948, 949.

Sufficiency of Evidence

Where medical testimony pertaining to defendant's antisocial nature and difficulty in controlling his sexual impulses may have established the defendant as a sexual deviate who should be confined for the protection of society, but was not sufficient to prove intent to commit a lewd and lascivious act upon a child, it was reversible error to convict the defendant of the felony. State v. Green, 143 M 234, 388 P 2d 362.

Collateral References

Infants@=20. 43 C.J.S. Infants § 22.

94-4107. (11006) Open and notorious adultery and fornication. Every person who lives in open and notorious cohabitation, in a state of adultery or fornication, is punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both. The intermarriage of the parties subsequent to the commission of the offense is a bar to the prosecution.

History: For earlier acts, see Sec. 127, p. 208, Bannack Stat.; Sec. 146, 4th Div. Rev. Stat. 1879; Sec. 161, 4th Div. Comp. Stat. 1887; en. Sec. 457, Pen. C. 1895; reen. Sec. 8343, Rev. C. 1907; re-en. Sec. 11006, R. C. M. 1921. Cal. Pen. C. Sec. 269a.

A Misdemeanor

The offense of living together in open and notorious cohabitation, in a state of fornication, is a misdemeanor, and falls within the jurisdiction of a justice of the peace. Hosoda v. Neville, 45 M 310, 312, 123 P 20.

Operation and Effect

Instance of a complaint, charging an offense under this section, having been filed as required by section 94-100-1. In re Graye, 36 M 394, 400, 93 P 266.

Collateral References

Adultery 1 et seq.; Fornication 1 et seq.; Lewdness 1, 2.

2 C.J.S. Adultery § 1 et seq.; 37 C.J.S. Fornication § 1 et seq.; 53 C.J.S. Lewdnees § 2.

See generally 2 Am. Jur. 2d 961, Adultery and Fornication.

Discontinuance by injured spouse of prosecution for adultery. 4 ALR 1340 and 61 ALR 973.

Single person who has carnal intercourse with married person of the opposite sex as guilty of aiding and abetting adultery. 5 ALR 783; 74 ALR 1110 and 131 ALR 1322.

Venereal disease as evidence of adultery. 5 ALR 1020 and 8 ALR 1540.

Liability as co-conspirator of one personally incapable of committing adultery who aids another to do so. 74 ALR 1114 and 131 ALR 1322.

Isolated acts of sexual intercourse as constituting criminal offense of adultery or fornication or illicit cohabitation. 74 ALR 1361.

94-4108. (11007) Seduction—penalty. Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison not more than five years, or by a fine not more than five thousand dollars, or both. The intermarriage of the parties subsequent to the commission of the offense is a bar to the prosecution.

History: En. Sec. 458, Pen. C. 1895; re-en. Sec. 8344, Rev. C. 1907; re-en. Sec. 11007, R. C. M. 1921. Cal. Pen. C. Sec. 268.

Cross-Reference
Damages for seduction, sec. 17-407.
Collateral References
Seduction № 29, 36.
79 C.J.S. Seduction § 31 et seq.

47 Am. Jur. 627, Seduction, generally.

Offer of marriage as defense to prosecution for seduction. 80 ALR 845.

Subsequent intermarriage of parties, forgiveness, compromise, etc., as defense to prosecution for seduction. 80 ALR 833.

Facts preventing a valid marriage be-

Facts preventing a valid marriage between prosecutrix and defendant as defense, 85 ALR 123.

Right of seduced female to maintain action for seduction. 121 ALR 1487.

94-4109. (11008) Importation and exportation of females for immoral purposes. The importation of women and girls into this state or the exportation of women and girls from this state for immoral purposes is hereby prohibited, and whoever shall induce, entice, or procure, or attempt to induce, entice, or procure to come in this state, or to go from this state, any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, or anyone who shall aid any such woman or girl in obtaining transportation to or within this state, for the purpose of prostitution or concubinage, or for any other immoral purpose, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 1, L. 1911; reen. Sec. 11008, R. C. M. 1921.

Constitutionality

Section 94-4109 is void since Congress has legislated upon this matter in the

Mann Act (U. S. C. Tit. 18, §§ 2421-2424). This section then, being in contravention of a valid law of the United State, is wholly void. Ex Parte Anderson, 125 M 331, 238 P 2d 910, 911, 912.

94-4110. (11009) Procuring women to reside in houses of prostitution or for immoral purposes a felony. Any person who shall place any female in the charge or custody of any other person for immoral purposes or in a house of prostitution or elsewhere with intent that she shall live a life of prostitution; or any person who shall compel or shall induce, entice, or procure, or attempt to induce, entice, procure or compel any female to reside with him or with any other person for immoral purposes, or for the purpose of prostitution, or shall compel any such female to reside in a house of prostitution, or compel or attempt to induce, entice, procure or compel her to live a life of prostitution, shall be guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 1, L. 1911; re-en. Sec. 11009, R. C. M. 1921.

Cross-References

Admission of minor to house of prostitution, sec. 94-35-137.

Enticing to place of prostitution, sec.

Keeping disorderly house, penalty, secs. 94-3607, 94-3608, 94-3614.

Operation and Effect

An attempt to induce a female to take up her residence in another state for immoral purposes, which was complete before transportation had commenced, was punishable under the Donlan, and not under the Mann, act. State v. Reed, 53 M 292, 163 P 477.

Sufficiency of Evidence

Evidence that defendant obtained and paid rent on prostitute's apartment, forced her to stay there, procured for her and took all money was sufficient for conviction under statute. State v. Crockett, 148 M 402, 421 P 2d 722.

Collateral References

Prostitution ← 1, 6.
73 C.J.S. Prostitution §§ 6-8.
42 Am. Jur. 264, Prostitution, § 5.

Police officer's failure to suppress bawdyhouse as punishable offense. 134 ALR 1258.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution. 161 ALR 356.

94-4111. (11010) Procuring women to reside in houses of prostitution or for immoral purposes a felony—procuring women for concubinage and other immoral purposes a felony. Any person who shall induce, entice, or procure, or attempt to induce, entice or procure any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 1, L. 1911; re-en. Sec. 11010, R. C. M. 1921.

Collateral References

Entrapment to commit crime of procuring women for immoral purposes, with view to prosecution therefor. 18 ALR 186; 66 ALR 478 and 86 ALR 263.

94-4112. (11011) Receiving money for causing immoral acts of women a felony. Any person who shall receive any money or other valuable thing for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons to whom she is not married shall be guilty of a felony and, upon conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 1, L. 1911; re-en. Sec. 11011, R. C. M. 1921.

94-4113. (11012) Paying money for procuring women for immoral purposes a felony. Any person who shall pay any money or other valuable thing to procure any female for the purpose of placing her for immoral purposes in any house of prostitution or elsewhere, with or without her consent, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 1, L. 1911; re-en. Sec. 11012, R. C. M. 1921.

94-4114. (11013) Receiving money for procuring women for immoral purposes a felony. Any person who shall knowingly receive any money or other valuable thing for or on account of procuring and placing in the custody of another person for immoral purposes any woman, with or without her consent, shall be guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 6, Ch. 1, L. 1911; re-en. Sec. 11013, R. C. M. 1921.

Sufficiency of Evidence

Evidence that defendant cashed check

given to prostitute by male brought to her by defendant who coerced her to prostitute for him was sufficient to support conviction. State v. Crockett, 148 M 402, 421 P 2d 722.

94-4115. (11014) Unlawful restraint of women in houses of prostitution and elsewhere a felony. Any person who shall hold, detain, restrain, or attempt to hold, detain, or restrain in any house of prostitution or other place, any female for the purpose of compelling such female, directly or indirectly, by her voluntary or involuntary service or labor to pay, liquidate or cancel any debt, dues or obligations incurred in such house of prostitution, or in any other place, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 1, L. 1911; re-en. Sec. 11014, R. C. M. 1921.

94-4116. (11015) Accepting money from earnings of prostitute a felony. Any person who shall knowingly accept, receive, levy, or appropriate any money or other valuable thing without consideration, from the proceeds or earnings of any woman engaged in prostitution shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine of not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment. Any such acceptance, receipt, levy, or appropriation of such money or valuable thing shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration.

History: En. Sec. 8, Ch. 1, L. 1911; re-en. Sec. 11015, R. C. M. 1921.

Presumption of Lack of Consideration

Under this case, held that, provision making the acceptance of money from a prostitute presumptive evidence of lack of consideration is valid, and in enacting it the legislature did not transgress its power. State v. Pippi, 59 M 116, 119, 195 P 556.

Separate Offense

Knowingly and without consideration taking or receiving from a prostitute any of her earnings is a separate and distinct offense, under this statute, from that of living upon her earnings. State v. Kanakaris, 54 M 180, 182, 169 P 42.

Where Accused Gave Note

Where defendant had given his note for money he obtained from a prostitute, he was not guilty of a violation of this section, prohibiting the accepting of money from such persons without consideration, even though he later refused to pay the note placed in a bank for collection. State v. Jones, 51 M 390, 393, 153 P 282.

Collateral References

Prostitution ← 1, 6.
73 C.J.S. Prostitution §§ 9-11.
42 Am. Jur. 266, Prostitution, § 9.

Constitutionality of statute enacted to prevent prostitution, and providing that upon the trial of one accused of violating its provisions, the acceptance of money from the earnings of a prostitute shall be prima facie evidence of lack of consideration. 51 ALR 1156; 86 ALR 179 and 162 ALR 495.

94-4117. (11016) Living with a common prostitute a felony. Any male person who shall live with, or in whole or in part upon, the earnings of, or money supplied by a common prostitute or woman of bad repute, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than one year nor more than twenty years.

History: En. Sec. 9, Ch. 1, L. 1911; re-en. Sec. 11016, R. C. M. 1921.

94-4118. (11030) Crime against nature. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.

History: Earlier acts were Sec. 44, p. 185, Bannack Stat.; re-en. Sec. 47, p. 277, Cod. Stat. 1871; re-en. Sec. 47, 4th Div. Rev. Stat. 1879; re-en. Sec. 50, 4th Div. Comp. Stat. 1887.

This section en. Sec. 496, Pen. C. 1895; re-en. Sec. 8359, Rev. C. 1907; re-en. Sec. 11030, R. C. M. 1921, Cal. Pen. C. Sec. 286.

Charge

Information held sufficient. State v. Guerin, 51 M 250, 252, 152 P 747.

Difficult To Prove or Disprove

In a prosecution for the infamous crime against nature (sodomy), courts should be assiduously on guard to warn the jury against yielding to the dictates of the intense prejudice naturally evoked by such a charge or convicting upon slight evidence, since the charge is easily made, hard to prove and still harder to disprove. State v. Keckonen, 107 M 253, 266, 84 P 2d 341.

Penetration by Mouth

The infamous crime against nature may be committed by penetration of the mouth. (following State v. Hoyt Guerin, 51 M 250, 152 P 747). State v. Dietz, 135 M 496, 343 P 2d 539, 541.

Where Accomplice's Testimony Insufficiently Corroborated

Testimony in a prosecution for the infamous crime against nature (sodomy), offered as corroborative of that of a boy accomplice, to connect the defendant with the commission of the offense, held insufficient as simply showing opportunity, suspicion, or that he and the boy were to-

gether in same room when arrested, or that he had made gifts to the boy, or the boy's nervous condition, etc., and therefore insufficient to warrant conviction. State v. Keckonen, 107 M 253, 261, 84 P 2d 341.

Where the corroborating evidence to the testimony of the accomplice showed that accomplice slept with the defendant and stayed overnight at defendant's house on several occasions, such evidence was insufficient to sustain the conviction as it does nothing more than show opportunity on the part of defendant to have committed the crime. State v. Gangner, 130 M 533, 305 P 2d 338.

Collateral References

Sodomy € 1.

81 C.J.S. Sodomy § 1 et seq. 38 Am. Jur. 539, Sodomy.

94-4119. (11031) Penetration sufficient to complete the crime. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

History: En. Sec. 497, Pen. C. 1895; re-en. Sec. 8360, Rev. C. 1907; re-en. Sec. 11031, R. C. M. 1921. Cal. Pen. C. Sec. 287.

Operation and Effect

There must be penetration before a person can be convicted of the infamous crime against nature. State v. Shambo, 133 M 305, 322 P 2d 657, 658.

94-4120. Child under age of sixteen cannot be accomplice. No child under the age of sixteen (16) years can be an accomplice to the commission or attempted commission of the infamous crime against nature.

History: En. Sec. 1, Ch. 68, L. 1951; amd. Sec. 1, Ch. 145, L. 1957.

CHAPTER 42

RESCUES AND ESCAPES

Section 94-4201. Rescuing prisoners.

94-4202. Retaking goods from custody of officer. 94-4203. Escapes from state prison—punishment.

94-4203. Escapes from state prison—punishment. 94-4204. Attempt to escape from state prison.

94-4205. Escapes from other than state prisons.

94-4206. Officers suffering convicts to escape. 94-4207. Assisting prisoner to escape.

94-4208. Carrying into prison things useful to aid in an escape.

94-4209. Expense of trial for escape.

94-4201. (10864) Rescuing prisoners. Every person who rescues, or attempts to rescue, or aids another person in rescuing, or attempting to rescue, any prisoner, from any prison or jail, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable by death; by imprisonment in the state prison not less than one nor more than fourteen years.

- 2. If such prisoner was in custody upon a conviction of any other felony; by imprisonment in the state prison not less than six months nor more than five years.
- 3. If such prisoner was in custody upon a charge of felony; by a fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding two years.
- 4. If such prisoner was in custody otherwise than upon a charge or conviction of felony; by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding six months.

History: Earlier acts were Secs. 112, 113, p. 295, Cod. Sec. 1871; re-en. Secs. 112, 113, 4th Div. Rev. Stat. 1879; re-en. Secs. 121, 122, 4th Div. Comp. Stat. 1887.

This section en. Sec. 210, Pen. C. 1895; re-en. Sec. 8220, Rev. C. 1907; re-en. Sec. 10864, R. C. M. 1921. Cal. Pen. C. Sec. 101.

Operation and Effect

On appeal by the state from a judgment of dismissal of a change of assault in the second degree against one of four defendants, informed against jointly, committed on a peace officer to prevent the incarceration of one of them after arrest, evidence held to show that the crime was committed as a result of a concerted de-

sign to effect a rescue, and that the court erred in advising the jury to return a verdict of not guilty. State v. Dennison, 94 M 159, 163, 21 P 2d 63.

Collateral References

Rescue \$\infty\$1, 5.
77 C.J.S. Rescue \ 1 et seq.
27 Am. Jur. 2d 850, Escape, Prison
Breaking, and Rescue, \ 3.

Responsibility of persons participating in jail delivery for homicide committed by one of their number. 15 ALR 456.

What justifies escape or attempt to escape, or assistance in that regard. 70 ALR 2d 1430.

94-4202. (10865) Retaking goods from custody of officer. Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

History: En. Sec. 211, Pen. C. 1895; re-en. Sec. 8221, Rev. C. 1907; re-en. Sec. 10865, R. C. M. 1921. Cal. Pen. C. Sec. 102.

Operation and Effect

Evidence in murder prosecution showed the defendant had planned to commit robbery by taking personal property from the custody of an officer who had seized it as stolen property. An instruction offered on the theory (based on this section and section 94-1704) that he had merely committed a misdemeanor in attempting to take and destroy evidence, and therefore could not be held guilty of murder in the first degree in the absence of a showing of premeditation, deliberation and malice, was properly refused as not ap-

plicable to the evidence. State v. Reagin, 64 M 481, 487, 210 P 86.

Unlawful Arrest

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest could not be justified as for violation of this section since officer did not have check in his possession under any process of law. Harrer v. Montgomery Ward & Co., 124 M 295, 221 P 2d 428, 435.

Collateral References

Rescue \$1. 77 C.J.S. Rescue \$14 et seq.

94-4203. (10866) Ecapes from state prison—punishment. Every prisoner confined in state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison.

History: En. Sec. 220, Pen. C. 1895; re-en. Sec. 8222, Rev. C. 1907; re-en. Sec. 10866, R. C. M. 1921. Cal. Pen. C. Sec. 105.

Consecutive Sentence

An escape sentence runs consecutively and not concurrently with the original sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

Parole

Granting of parole to an escape sentence by virtue of wording of this section did not result in discharge of original sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557; Petition of

Duran, — M —, 448 P 2d 137.

This section does not deal with paroles and therefore, does not stand for the proposition that an inmate, who has escaped from prison, must serve his entire original sentence in prison plus his escape sentence upon apprehension before being considered for parole. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553,

The word "discharge" as used in this section does not mean "release on parole." State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

Sequence of Consecutive Sentences

Warden's execution of consecutive sentences in incorrect sequence did not infringe upon prisoner's rights, and his petition for habeas corpus was denied. Petition of Cheadle, 143 M 327, 389 P 2d

Speedy Trial upon Escape Charge

Petitioner, who was confined in the United States penitentiary at Leavenworth, Kansas, applied to supreme court of Montana for writ of mandate to require district court of Powell county, Montana, to grant him a speedy trial on an escape charge, averring that a detainer had been filed with that institution by warden of Montana state prison to which he had been sentenced to terms of eight years and five years to run concurrently. Since records showed that he had escaped from custody after having served one year, two months and thirteen days of his sentences and he would be returned to state prison to complete his unexpired sentences, the application was denied. In re Well's Petition, 139 M 611, 362 P 2d 420, 421.

Collateral References

Escape \$\infty 4, 13. 30 A C.J.S. Escape \$\\$ 14-17, 28. 27 Am. Jur. 2d 848, Escape, Prison Breaking, and Rescue, \\$ 1.

Responsibility of persons participating in jail delivery for homicide committed by one of their number. 15 ALR 456.

What justifies escape or attempt to escape, or assistance in that regard. 70 ALR 2d 1430.

Escape or prison breach as affected by means employed. 96 ALR 2d 520.

(10867) Attempt to escape from state prison. Every prisoner confined in the state prison for a term less than for life, who attempts to escape from such prison, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years, and, on conviction thereof, the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison.

History: En. Sec. 221, Pen. C. 1895; re-en. Sec. 8223, Rev. C. 1907; re-en. Sec. 10867, R. C. M. 1921, Cal. Pen. C. Sec. 106.

Collateral References

Escape 51/2. 30A C.J.S. Escape §§ 9-12. 27 Am. Jur. 2d 851, Escape, Prison Breaking, and Rescue, § 4.

94-4205. (10868) Escapes from other than state prisons. Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

History: En. Sec. 222, Pen. C. 1895; re-en. Sec. 8224, Rev. C. 1907; re-en. Sec. 10868, R. C. M. 1921. Cal. Pen. C. Sec. 107.

Collateral References

Escape or prison breach as affected by means employed. 96 ALR 2d 520.

94-4206. (10869) Officers suffering convicts to escape. Every keeper of a prison, sheriff, deputy sheriff, constable, or jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars.

History: Ap. p. Sec. 102, p. 202, Bannack Stat.; re-en. Sec. 114, p. 295, Cod. Stat. 1871; re-en. Sec. 117, 4th Div. Rev. Stat. 1879; re-en. Sec. 123, 4th Div. Comp. Stat. 1887; en. Sec. 223, Pen. C. 1895; re-en. Sec. 8225, Rev. C. 1907; re-en. Sec. 10869, R. C. M. 1921. Cal. Pen. C. Sec. 108.

Collateral References

Escape 3.

30A C.J.S. Escape § 4. 27 Am. Jur. 2d 862, Escape, Prison Breaking, and Rescue, § 21.

Peace officer's liability for act of assistant or deputy in permitting escape. 1 ALR 240; 102 ALR 174; 116 ALR 1064 and 71 ALR 2d 1140.

(10870) Assisting prisoner to escape. Every person who willfully assists any prisoner confined in any prison, or in the lawful custody of any officer or person, to escape, or in an attempt to escape from such prison or custody, is punishable as provided in the preceding section.

History: Ap. p. Sec. 105, p. 202, Bannack Stat.; re-en. Sec. 117, p. 296, Cod. Stat. 1871; re-en. Sec. 114, 4th Div. Rev. Stat. 1879; re-en. Sec. 126, 4th Div. Comp. Stat. 1887; en. Sec. 224, Pen. C. 1895; re-en. Sec. 8226, Rev. C. 1907; re-en. Sec. 10870, R. C. M. 1921. Cal. Pen. C. Sec. 109.

Collateral References

Escape 5.

30A C.J.S. Escape §§ 19-24.

94-4208. (10871) Carrying into prison things useful to aid in an escape. Every person who carries or sends into a prison anything useful in aiding a prisoner to make his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as provided in section 94-4206.

History: Ap. p. Sec. 103, p. 202, Bannack Stat.; re-en. Sec. 115, p. 295, Cod. Stat. 1871; re-en. Sec. 115, 4th Div. Rev. Stat. 1879; re-en. Sec. 124, 4th Div. Comp.

Stat. 1887; en. Sec. 225, Pen. C. 1895; re-en. Sec. 8227, Rev. C. 1907; re-en. Sec. 10871, R. C. M. 1921. Cal. Pen. C. Sec. 110.

94-4209. (10872) Expense of trial for escape. Whenever a trial takes place of any person under any of the provisions of sections 94-4203 and 94-4204, and whenever a prisoner in the state prison shall be tried for any crime committed therein, the county clerk of the county where such trial is had shall make out a statement of all the costs incurred by the county for the trial of such case, and of guarding and keeping such prisoner, properly certified by a district judge of said county, which statement shall be sent to the board of state prison commissioners for their approval; and after such approval, said board must cause the amount of such costs to be paid out of the money appropriated for the support of the state prison to the county treasurer of the county where such trial was had.

History: En. Sec. 226, Pen. C. 1895; re-en. Sec. 8228, Rev. C. 1907; re-en. Sec. 10872, R. C. M. 1921, Cal. Pen. C. Sec. 111.

Collateral References Costs@294. 20 C.J.S. Costs § 442.

CHAPTER 43

ROBBERY

Section 94-4301. Robbery defined.

What fear may be an element in robbery. 94-4302.

94-4303. Punishment of robbery.

94-4301. (10973) Robbery defined. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

History: En. Sec. 59, p. 188, Bannack Stat.; re-en. Sec. 71, p. 282, Cod. Stat. 1871; re-en. Sec. 71, 4th Div. Rev. Stat. 1879; re-en. Sec. 77, 4th Div. Comp. Stat. 1887; amd. Sec. 390, Pen. C. 1895; re-en. Sec. 8309, Rev. C. 1907; re-en. Sec. 10973, R. C. M. 1921. Cal. Pen. C. Sec. 211.

"Accomplished"

An instruction defining robbery in the language of this section except using the word "accompanied" instead of the word "accomplished," is reversible error. State v. Johnson, 26 M 9, 10, 66 P 290. See also State v. Pemberton, 39 M 530, 533, 104 P 556.

Evidence Admissible

Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, evidence as to details of the attempted robbery of the train, and a conspiracy therefor was admissible in prosecution for robbery of clerk. State v. Howard, 30 M 518, 524, 77 P 50.

Fear

Under this section a robbery victim is put in the fear required by section 94-4302 when he is forced to look down the barrel of a 45-caliber automatic pistol held by a stranger whose purpose is to rob the victim. State v. Erickson, 141 M 118, 375 P 2d 314, 316.

"Felonious Taking"

An instruction defining robbery, which omits to state "the taking" must be felonious, is prejudicially erroneous. State v. Oliver, 20 M 318, 319, 50 P 1018. See also State v. Rodgers, 21 M 143, 144, 53 P 97.

Under the rule that once a fact is established, it is presumed to have remained as proved to exist until the contrary is shown, held, in a prosecution for robbery, in which defendant on appeal contended that the felonious taking of a sum of money from the person of the complaining witness had not been proven, that evidence that defendant knew that the witness nine days before had placed his wallet containing the money in his inside vest pocket where he kept his money, which pocket had been cut out after the witness had been knocked down, etc., was sufficient to establish the taking. State v. Olson, 87 M 389, 393, 287 P 938.

Force or Fear

The taking of personal property from the person or immediate presence of another, without resistance on his part, does not bring the offense within the definition of robbery, it being necessary that the element of force or fear should be present to constitute the crime. State v. Paisley, 36 M 237, 244, 92 P 566.

Since this section does not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another the crime of robbery, an information charging such offense need not allege the degree of force used in accomplishing it. State v. Paisley, 36 M 237, 244, 92 P 566.

Though the crime of robbery can be accomplished only by means of force or fear, and is most frequently accompanied by an assault, proof of an assault without circumstances tending to show that it was resorted to as a means to prevent resistance, and in order to obtain property from the person or immediate presence of the one assaulted, falls far short of establishing the crime of an attempt to commit robbery. State v. Hanson, 49 M 361, 368, 141 P 669.

Sufficiency of Charge

An indictment which charges that the defendant committed the robbery by force and intimidation and by putting the person robbed in fear, is sufficient. State v. Clanev. 20 M 498, 501, 52 P 267.

Clancy, 20 M 498, 501, 52 P 267.

An information on a prosecution for robbery, which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession, and from the immediate presence of a specified person, does not charge more than one offense. State v. Howard, 30 M 518, 522, 77 P 50.

Collateral References

Robbery 1.
77 C.J.S. Robbery 1 et seq.
46 Am. Jur. 139, Robbery, 2.

Taking property from the person by stealth as robbery. 8 ALR 359. "Infamous offense," robbery as, within

"Infamous offense," robbery as, within constitutional or statutory provision in relation to presentment and indictment by grand jury. 24 ALR 1016.

Threat to arrest or prosecute and acts

Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery. 27 ALR 1299.

Retaking of money lost at gambling as robbery. 35 ALR 1461; 42 ALR 741; 116 ALR 997 and 46 ALR 2d 1227.

Retention of property, or attempt to escape, by force or putting in fear as equivalent to taking in that manner for purposes of robbery. 58 ALR 656.

Unloaded firearm as dangerous weapon within meaning of statute as to robbery

while armed with dangerous weapon. 74 ALR 1209.

Outlawed liquor as subject of robbery.

75 ALR 1480.

Appropriation or removal without payment of property delivered in expectation of cash payment as robbery. 83 ALR 447.

When person from whom property is taken is deemed to have been in possession thereof. 123 ALR 1099.

May participant in robbery be convicted

of receiving or concealing the stolen property. 136 ALR 1087.

Robbery or assault to commit robbery as affected by intent to collect or secure debt or claim. 46 ALR 2d 1227.

Gambling or lottery paraphernalia as subject of robbery. 51 ALR 2d 1396.

Validity and construction of Federal Bank Robbery Act. 59 ALR 2d 946.

Robbery by means of toy or simulated gun or pistol. 61 ALR 2d 996.

94-4302. (10974) What fear may be an element in robbery. The fear mentioned in the last section may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

History: En. Sec. 391, Pen. C. 1895; re-en. Sec. 8310, Rev. C. 1907; re-en. Sec. 10974, R. C. M. 1921. Cal. Pen. C. Sec. 212.

Presumption

It is reasonable to presume fear where a robbery victim is forced to look down the barrel of a 45-caliber automatic pistol held by a stranger whose purpose is to rob his victim. State v. Erickson, 141 M 118, 375 P 2d 314, 316.

Sufficiency of Charge

Example of an information sufficiently charging the fear necessary to constitute the crime of robbery as defined in this section. State v. Gill, 21 M 151, 153, 53 P 184.

Assuming that an information charging

robbery was defective in not stating facts sufficient to allege fear, within the definition given in this section, on the part of the person robbed, still, the allegation of force, the alternative element of the crime, having been sufficient, the pleading was not vulnerable to attack. State v. Paisley, 36 M 237, 245, 92 P 566.

Collateral References

Robbery € 7. 77 C.J.S. Robbery § 10. 46 Am. Jur. 145 et seq., Robbery, § 14

Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery. 27 ALR 1299.

94-4303. (10975) **Punishment of robbery**. Robbery is punishable by imprisonment in the state prison for a term not less than one year.

History: En. Sec. 392, Pen. C. 1895; re-en. Sec. 8311, Rev. C. 1907; amd. Sec. 1, Ch. 102, L. 1921; re-en. Sec. 10975, R. C. M. 1921. Cal. Pen. C. Sec. 213.

Operation and Effect

A sentence to fifty years' imprisonment of one convicted of robbery, who is also

found to have been previously convicted in another state of burglary, is warranted by the law. State v. Paisley, 36 M 237, 248, 92 P 566.

Collateral References

Robberv 30. 77 C.J.S. Robbery § 51 et seq.

CHAPTER 44

SEDITION-CRIMINAL SYNDICALISM-DISPLAY OF RED FLAG-SUBVERSIVE ORGANIZATIONS

Section 94-4401. Sedition defined.

Punishment for sedition. 94-4402.

Emergency clause. 94-4403.

94-4404. Criminal syndicalism defined.

94-4405. Sabotage defined.

Penalty for sabotage, criminal syndicalism and other offenses. 94-4406.

94-4407. Penalty for certain unlawful assemblings to advocate forbidden acts.

94-4408. Penalty for certain unlawful assemblings to advocate forbidden acts-penalty for owner of premises.

94-4410. Prohibition against exhibiting red flag or emblem.
94-4411. Subversive Organization Registration Law—title of act.
94-4412. Purpose of act.

94-4413. Subversive organization defined.

Organization subject to foreign control defined. 94-4414.

94-4415. Exceptions from definition of subversive organization.

94-4416. Organization pursuant to law-no exemption.

94-4417. 94-4418. Rules and regulations.

Information filed with secretary of state.

94-4419. Amendment of charter, constitution, bylaws or other regulationsfiling with secretary of state.

Change of officers or purposes-filing with secretary of state. 94-4420.

94-4421. Semiannual statement of members.

Report of meetings authorizing political action. Statements filed with secretary of state are public records. 94-4422. 94-4423.

94-4424. Anonymous letters prohibited.

94-4425. Penalty of organization for violating act.

94-4426. Penalty of officer of organization.

94-4427. Penalty of member of organization.

94-4401. (10737) Sedition defined. Any person or persons who shall utter, print, write, or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring, or abusive language about the United States, the government of the United States, or the form of government of the United States, or the constitution of the United States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language calculated to bring the form of government of the United States, or the constitution of the United States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, into contempt, scorn, contumely, or disrepute, or shall utter, print, write, or publish any language calculated to incite or inflame resistance to any duly constituted federal or state authority, or who shall display the flag of any foreign enemy, or who shall, by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in the United States of any thing or things, product or products, necessary or essential to the prosecution of any war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of any war; or who, in time of war in which the United States may be engaged, shall willfully make or convey false reports or statements with intent to interfere with the operation or success of the military or naval forces of the United States, or promote the success of its enemy or enemies, or shall willfully cause, or attempt to cause, disaffection in the military or naval forces of the United States, or who shall, by uttering, printing, writing, publishing, language spoken, or by any act or acts, interfere with, obstruct, or attempt to obstruct, the operation of any national selective draft law or the recruiting or the enlistment service of the United States, to the injury of the military or naval service thereof, shall be guilty of the crime of sedition.

History: En. Sec. 1, Ch. 77, L. 1919; re-en. Sec. 10737, R. C. M. 1921.

NOTE.—The above section was first enacted as section 1, Chapter 11, Ex. L. 1918, commencing with the words, "Whenever the United States shall be engaged in war." The act of 1919 apparently repeals by implication the earlier act.

Constitutionality

The act defining sedition and prescribing the punishment therefor is not unconstitutional as infringing upon the exclusive war powers of Congress. State v. Kahn, 56 M 108, 115, 182 P 107; State v. Wyman, 56 M 600, 605, 186 P 1.

The failure of the legislature to make evil intent an ingredient of the offense does not invalidate this law. State v.

Kahn, 56 M 108, 118, 182 P 107.

"Calculate" Defined

Primarily the word "calculate" means to compute mathematically, and it implies power to think, to reason, to plan. In its broader significance it means to intend, to purpose, to design; and as used in the sedition act, it is broad enough to imply an evil intent in the use of language "calculated to incite or inflame," etc. State v. Kahn, 56 M 108, 119, 182 P 107.

How Affected by Federal Act

The construction of the Federal Espionage Act by the supreme court of the United States, though not conclusive upon the state supreme court in construing the Sedition Act, is entitled to great respect, the two statutes being similar in all respects. State v. Kahn, 56 M 108, 121, 182 P 107.

Instruction

Instruction that accused could be convicted of sedition if he made either of statements charged in information was not erroneous. State v. Wyman, 56 M 600, 606, 186 P 1.

"Intent"

The sedition act is valid, though intent is not made an ingredient of the crime; if intent is essential to its validity, the word "calculated," as used in that part of the act which provides that one who "shall utter language calculated to incite or inflame resistance," etc., shall be guilty of sedition, etc., is sufficiently broad to cover intent. State v. Wyman, 56 M 600, 605, 186 P 1.

While intent is not specifically made an element of the crime of sedition as defined by this section, the legislature inferentially made it such by the use of the word "calculated" when it made language "calculated to incite or influence resistance" to constituted authority a public offense. State v. Smith, 57 M 349, 188 P 644.

The intent of the person deliberately writing or publishing a seditious article contrary to the provisions of this section is immaterial and not an ingredient of the crime of sedition. State v. Smith, 57 M 349, 188 P 644.

Sufficiency of Charge

An information alleging that defendant, in vile and vulgar language, voiced his opinion in a saloon, that the Industrial Workers of the World, of which he was an officer, would win the case of United States v. Haywood et al., then on trial in the state of Illinois, was insufficient to charge sedition. State v. Griffith, 56 M 241, 242, 184 P 219.

An information charging sedition, in that defendant knowingly, unlawfully, etc., uttered and published disloyal, profane, violent, scurrilous, contemptuous, and abusive language concerning the soldiers and the uniform of the army of the United States, was defective for failure to set out the specific words characterizing his remarks as disloyal, contemptuous, etc. State v. Wolf, 56 M 493, 498, 185 P 556.

An information alleging in substance that defendant uttered language to the effect that the soldiers of the United States would commit the same atrocities as those reported to have been committed by German soldiers, that the soldiers of the United States were no better than German soldiers, etc., was sufficient to charge sedition. State v. Wyman, 56 M 600, 606, 186 P 1.

Information held sufficient to charge sedition in State v. Brooks, 57 M 480, 188 P 942.

Collateral References

Insurrection and Sedition = 1.

46 C.J.S. Insurrection and Sedition § 3. 47 Am. Jur. 610, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities, § 2.

Validity of legislation directed against social or industrial propaganda deemed to be a dangerous tendency. 1 ALR 336; 20 ALR 1535 and 73 ALR 1494.

94-4402. (10738) Punishment for sedition. Every person found guilty of the crime of sedition shall be punished for each offense by a fine of not less than two hundred dollars nor more than twenty thousand dollars, or by imprisonment in the state prison for not less than one year nor more than twenty years, or by both such fine and imprisonment. In the event of a fine imposed for violation of any of the provisions of this act and not paid, the guilty person shall be imprisoned for a period represented by a credit of two dollars per day until the amount of the fine is fully paid.

History: En. Sec. 2, Ch. 77, L. 1919; re-en. Sec. 10738, R. C. M. 1921.

Collateral References
Insurrection and Sedition 5.
46 C.J.S. Insurrection and Sedition § 3.

94-4403. (10739) Emergency clause. This act is hereby declared to be an emergency law and a law necessary for the immediate preservation of the public peace and safety.

History: En. Sec. 3, Ch. 77, L. 1919; re-en. Sec. 10739, R. C. M. 1921.

94-4404. (10740) Criminal syndicalism defined. Criminal syndicalism is hereby defined to be the doctrine which advocates crime, violence, force, arson, destruction of property, sabotage, or other unlawful acts or methods, or any such acts, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution.

History: En. Sec. 1, Ch. 7, Ex. L. 1918; re-en. Sec. 10740, R. C. M. 1921.

Collateral References

Insurrection and Sedition € 1.
46 C.J.S. Insurrection and Sedition § 1.
47 Am. Jur. 611, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities, § 3.

94.4405. (10741) Sabotage defined. Sabotage is hereby defined to be malicious, felonious, intentional, or unlawful damage, injury, or destruction of real or personal property, of any form whatsoever, of any employer, or owner, by his or her employee or employees, or any employer or employers, or by any person or persons, at their own instance, or at the instance, request, or instigation of such employees, employers, or any other person.

History: En. Sec. 2, Ch. 7, Ex. L. 1918; re-en. Sec. 10741, R. C. M. 1921.

Collateral References

Insurrection and Sedition № 1. 46 C.J.S. Insurrection and Sedition § 1. 47 Am. Jur. 611, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities, § 3.

94-4406. (10742) Penalty for sabotage, criminal syndicalism and other offenses. Any person who, by word of mouth or writing, advocates, suggests, or teaches the duty, necessity, propriety, or expediency of crime, criminal syndicalism, or sabotage, or who shall advocate, suggest, or teach the duty, necessity, propriety, or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, or who prints, publishes, edits, issues, or knowingly circulates, sells, distributes, or publicly displays any books, pamphlets, paper, handbill, poster, document, or written or printed matter in any form whatsoever, containing, advocating, advising, suggesting, or teaching crime, criminal syndicalism, sabotage, the doing of any act of violence, the destruction of or damage to any property, the injury to any person, or the commission of any crime or unlawful act, as a means of accomplishing, effect-

ing, or bringing about any industrial or political ends, or change, or as a means of accomplishing, effecting, or bringing about any industrial or political revolution, or who shall openly, or at all, attempt to justify, by word of mouth or writing, the commission or the attempt to commit sabotage, any act of violence, the destruction of or damage to any property, the injury of any person, or the commission of any crime or unlawful act, with the intent to exemplify, spread, or teach or suggest criminal syndicalism, or organizes, or helps to organize, or become a member of, or voluntarily assembles with, any society or assemblage of persons formed to teach or advocate, or which teaches, advocates, or suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety, or expediency of doing any act of violence, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year or more than five years, or by a fine of not less than two hundred dollars or not more than one thousand dollars, or by both such fine and imprisonment.

SEDITION

History: En. Sec. 3, Ch. 7, Ex. L. 1918; re-en. Sec. 10742, R. C. M. 1921.

94-4407. (10743) Penalty for certain unlawful assemblings to advocate forbidden acts. Wherever two or more persons assemble or consort for the purpose of advocating, teaching, or suggesting the doctrine of criminal syndicalism, as defined in this act, or to advocate, teach, suggest, or encourage sabotage, as defined in this act, or the duty, necessity, propriety, or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, it is hereby declared unlawful, and every person voluntarily participating therein, by his presence aids or instigates, is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for not less than one year or more than five years, or by a fine of not less than two hundred dollars or more than one thousand dollars, or by both such imprisonment and fine.

History: En. Sec. 4, Ch. 7, Ex. L. 1918; re-en. Sec. 10743, R. C. M. 1921.

Cross-Reference

Unlawful assembly, punishment, sec. 94-35-243.

94-4408. (10744) Penalty for certain unlawful assemblings to advocate forbidden acts—penalty for owner of premises. The owner, lessee, agent, superintendent, or person in charge or occupation of any place, building, room or rooms, or structure, who knowingly permits therein any assembly or consort of persons prohibited by the provisions of the preceding section, or who, after notification that the place or premises, or any part thereof, is or are so used, permits such use to be continued, is guilty of a misdemeanor, and punishable, upon conviction thereof, by imprisonment in the county jail for not less than sixty days or for not more than one year, or

by a fine of not less than one hundred dollars or more than five hundred dollars, or by both such imprisonment and fine.

History: En. Sec. 5, Ch. 7, Ex. L. 1918; re-en. Sec. 10744, R. C. M. 1921.

94-4409. (10745) Prohibition against exhibiting red flag or emblem. In any public street, avenue, alley, meeting hall, or place within the state of Montana, it shall be unlawful to carry, display, exhibit, or cause to be carried, displayed, or exhibited any red flag, red banner, or red emblem, commonly accepted as symbolic of social or industrial revolution, or any flag, banner, or emblem, bearing words, inscriptions, or representations opposed to organized government, of or within the United States; provided, that nothing herein shall be construed to deny the right of every citizen peaceably to assemble for the purpose of securing redress of grievances in the manner provided by law.

History: En. Sec. 1, Ch. 25, L. 1919; re-en. Sec. 10745, R. C. M. 1921.

Collateral References

Insurrection and Sedition = 2.

46 C.J.S. Insurrection and Sedition § 2. 47 Am. Jur. 617, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities, § 14.

94-4410. (10746) Prohibition against exhibiting red flag or emblem—penalty. Any person violating the provisions of this act shall, upon conviction, be punishable by imprisonment in the county jail for a period not to exceed six months, or shall be fined in a sum not to exceed five hundred dollars, or shall be imprisoned in the state prison for a period of not less than one nor more than five years, or shall suffer both such fine and imprisonment.

History: En. Sec. 2, Ch. 25, L. 1919; re-en. Sec. 10746, R. C. M. 1921.

94-4411. Subversive Organization Registration Law—title of act. This act may be cited as the "Subversive Organization Registration Law."

History: En. Sec. 1, Ch. 215, L. 1951.

Collateral References

Insurrection and Sedition € 1, 2. 46 C.J.S. Insurrection and Sedition §§ 1, 47 Am. Jur. 616 et seq., Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities, § 11 et seq.

94-4412. Purpose of act. This act is adopted in the exercise of the police power of this state for the protection of the public peace and safety by requiring the registration of subversive organizations which are conceived and exist for the purpose of undermining and eventually destroying the democratic form of government in this state and in the United States. History: En. Sec. 2, Ch. 215, L. 1951.

- 94-4413. Subversive organization defined. As used in this title, "subversive organization" means every corporation, association, society, camp, group, political party, assembly, and everybody or organization composed of two [2] or more persons or members, which comes within all or any of the following descriptions:
- (a) Which directly or indirectly advocates, advises, teaches, or practices, the duty, necessity, or propriety of controlling, conducting, seizing,

or overthrowing the government of the United States, of this state, or of any political subdivision thereof by force or violence;

(b) Which is subject to foreign control as defined in section 94-4414 hereof.

History: En. Sec. 3, Ch. 215, L. 1951.

- 94-4414. Organization subject to foreign control defined. An organization is "subject to foreign control" if it comes within either of the following descriptions:
- (a) It solicits or accepts financial contributions, loans, or support of any kind directly or indirectly from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, an agent, agency, or instrumentality of a foreign government or political subdivision thereof, a political party in a foreign country, or an international political organization;
- (b) Its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or a political subdivision thereof, an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, a political party in a foreign country, or an international political organization.

History: En. Sec. 4, Ch. 215, L. 1951.

94-4415. Exceptions from definition of subversive organization. "Subversive organization" does not include any labor union or religious, fraternal, or patriotic organizations, society, or association whose objectives and aims do not contemplate the overthrow of the government of the United States, of this state or of any political subdivision thereof by force or violence.

History: En. Sec. 5, Ch. 215, L. 1951.

94-4416. Organization pursuant to law—no exemption. This act imposes additional requirements upon corporations, associations, or organizations which are subversive organizations. Neither the fact that such a corporation, association, or organization was organized pursuant to law nor that its affairs and activities are in any respect regulated by law exempts it from complying with this title.

History: En. Sec. 6, Ch. 215, L. 1951.

94-4417. Rules and regulations. The secretary of state may adopt and promulgate such rules and regulations as may be necessary to carry out the provisions of this title, and may alter, amend, or repeal such rules and regulations.

History: En. Sec. 7, Ch. 215, L. 1951.

94-4418. Information filed with secretary of state. Every subversive organization in existence on July 1, 1951, shall within thirty (30) days after that date, and every subversive organization thereafter organized shall within ten (10) days after its organization, file with the secretary of state, on such forms and in such detail as he may prescribe, the following information and documents:

- (a) A complete and detailed statement subscribed, under oath, by all of its officers, showing all of the following:
 - (1) Its name and post-office address;
- (2) The names and addresses of all its branches, chapters, and affiliates;
- (3) The names, nationalities, and residence addresses of its officers and members, and the qualifications required for membership in it;
- (4) The nature and extent of its existing and proposed aims, purposes, and activities;
 - (5) The times and places of its meetings;
- (6) The description and location of the real property and the kind, quantity, and quality of the personal property owned by it, its assets and liabilities, the methods for the financing of its activities, and the names and addresses of all persons, organizations, and other sources who or which have contributed money, property, literature, or other things of value to the organization or any of its branches, chapters or affiliates for any of its purposes;
- (7) Such other information as the secretary of state may from time to time require.
 - (b) A true copy, certified by all of its officers, of all of the following:
- (1) Its charter, articles of association, or constitution, and its bylaws, rules, and regulations;
 - (2) Its oath, affirmation, or pledge of membership, if any;
- (3) Each agreement, resolution, and other instrument or document relating to its organization, powers, and purposes, and the powers and duties of its officers and members:
- (4) Each book, pamphlet, leaflet, or other printed, written, or illustrated matter directly or indirectly issued or distributed by it or in its behalf, or to or by its members with its knowledge, consent, or approval;
- (5) Such other documents as the secretary of state may from time to time require.
- (c) A description of the uniforms, badges, insignia, or other means of identification prescribed by it, and worn or carried by its officers or members, or any of such officers or members.
- (d) In case it is subject to foreign control, a statement of the manner in which it is subject.

History: En. Sec. 8, Ch. 215, L. 1951.

94-4419. Amendment of charter, constitution, bylaws or other regulations—filing with secretary of state. Every subversive organization shall within ten (10) days after any revision or amendment of, or other change with respect to, its charter, articles of association, constitution, bylaws, rules, regulations, oath, affirmation, or pledge of membership, or any part thereof, file with the secretary of state a true copy certified by all of its officers of the revised, amended, or changed charter, articles of association, constitution, bylaws, rules, regulations, oath, affirmation, or pledge of membership, or part thereof.

History: En. Sec. 9, Ch. 215, L. 1951.

94-4425

94-4420. Change of officers or purposes—filing with secretary of state. Every subversive organization shall within ten (10) days after a change has been made in its officers, or in its aims, purposes, activities, property holdings, or methods and sources of financing its activities, file with the secretary of state a statement subscribed under oath by all of its officers showing the change.

History: En. Sec. 10, Ch. 215, L. 1951.

- 94-4421. Semiannual statement of members. Every subversive organization shall at least once in each period of six (6) months file with the secretary of state a statement subscribed under oath by all of its officers showing the names and residence addresses of all persons who have been admitted to membership during that period or, if no members have been admitted during that period, a statement to that effect similarly subscribed. History: En. Sec. 11, Ch. 215, L. 1951.
- 94-4422. Report of meetings authorizing political action. Every subversive organization shall within ten (10) days after the adoption thereof file with the secretary of state, on such form and in such detail as he may prescribe, each resolution adopted, or the minutes of any meeting held by it, authorizing or providing for concerted action by its officers, members, or a part of its membership, to promote or prevent the passage of any act of legislation by any local, state, or federal legislative body, or to support or defeat any candidate for public office.

History: En. Sec. 12, Ch. 215, L. 1951.

94-4423. Statements filed with secretary of state are public records. All statements or documents filed with the secretary of state under sections 94-4411 to 94-4427 are public records and shall be open to public examination and inspection at all reasonable hours.

History: En. Sec. 13, Ch. 215, L. 1951.

94-4424. Anonymous letters prohibited. A subversive organization shall not send, deliver, mail or transmit, or suffer or permit to be sent, delivered, mailed, or transmitted, to any person in this state who is not a member of the organization any anonymous letter, document, leaflet, or other written or printed matter. All letters, documents, leaflets, or other written or printed matter issued by a subversive organization which are intended to come to the attention of a person who is not a member of the organization shall bear the name of the organization and the name and residences of its officers.

History: En. Sec. 14, Ch. 215, L. 1951.

94-4425. Penalty of organization for violating act. Any subversive organization which violates any provisions of sections 94-4411 to 94-4427 is guilty of a felony punishable by fine of not less than one thousand dollars (\$1,000.00) nor more than ten thousand dollars (\$10,000.00). Any such violation constitutes a separate and distinct offense for each day, or part thereof, during which it is continued.

History: En. Sec. 15, Ch. 215, L. 1951.

94-4426. Penalty of officer of organization. Any officer or member of the board of directors, board of trustees, executive committee, or other similar governing body of a subversive organization who violates any provision of sections 94-4411 to 94-4427, or permits or acquiesces in the violation of any provision of this title by the organization is guilty of a felony punishable by fine of not less than five hundred dollars (\$500.00) nor more than five thousand dollars (\$5,000.00), or by imprisonment in a state prison for not less than six (6) months nor more than five (5) years, or by both.

History: En. Sec. 16, Ch. 215, L. 1951.

94-4427. Penalty of member of organization. Any person who becomes or remains a member of any subversive organization, or attends a meeting thereof, with knowledge that the organization has failed to comply with any provision of sections 94-4411 to 94-4427, is guilty of a misdemeanor punishable by fine of not less than ten dollars (\$10.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment in the county jail for not less than ten (10) days nor more than one (1) year, or by both.

History: En. Sec. 17, Ch. 215, L. 1951.

Separability of Provisions

Section 18 of Ch. 215, L. 1951 read "If any provision of this act or the application thereof to any person, corporation, association, organization, or circumstances, is for any reason held invalid, ineffective, or unconstitutional by a court of competent jurisdiction, the remainder of this act, or the application of such provision

to other persons, corporations, associations, organizations, or circumstances, shall not be affected thereby, and the legislative assembly hereby declares the severability of the several sections and provisions of this act, and that it would have enacted the same without the invalid provisions or the invalid applications, as the case may be, had such invalidity been apparent."

CHAPTER 45

TREASON AND MISPRISION OF TREASON

Section 94-4501. Treason, who only can commit. 94-4502. Misprision of treason.

94-4501. (10735) Treason, who only can commit. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason is death.

History: En. Sec. 50, Pen. C. 1895; re-en. Sec. 8122, Rev. C. 1907; re-en. Sec. 10735, R. C. M. 1921. Cal. Pen. C. Sec. 37.

Collateral References

Treason © 1. 87 C.J.S. Treason § 1 et seq. 52 Am. Jur. 796 et seq., Treason, § 2 et seq.

Federal constitutional provisions as to treason as affecting validity of legislation directed against political, social, or industrial propaganda. 20 ALR 1538 and 73 ALR 1494.

94-4502. (10736) Misprision of treason. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the state prison for a term not exceeding five years.

History: En. Sec. 51, Pen. C. 1895; re-en. Sec. 8123, Rev. C. 1907; re-en. Sec. 10736, R. C. M. 1921. Cal. Pen. C. Sec. 38.

Collateral References Treason = 8. 87 C.J.S. Treason § 10. 52 Am. Jur. 800, Treason, § 10.

CHAPTER 46

VIOLATING SEPULTURE AND REMAINS OF THE DEAD

Section 94-4601.

Unlawful mutilation or removal of dead bodies. Unlawful removal of dead body from grave for dissection, etc. 94-4602.

Who are charged with the duty of burial. 94-4603.

Punishment for omitting to bury.

94-4605. Who are entitled to custody of a body.

94-4606. Arresting or attaching a dead body. 94-4607. Defacing tombs or monuments.

94-4601. (11032) Unlawful mutilation or removal of dead bodies. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.

History: En. Sec. 2, p. 114, L. 1889; amd. Sec. 510, Pen. C. 1895; re-en. Sec. 8361, Rev. C. 1907; re-en. Sec. 11032, 8361, Rev. C. 1907; 16-61, 2008. R. C. M. 1921. Cal. Pen. C. Sec. 290.

Collateral References Dead Bodies 7. 25A C.J.S. Dead Bodies § 10. 22 Am. Jur. 2d 593, Dead Bodies, § 47.

(11033) Unlawful removal of dead body from grave for dissection, etc. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same has been deposited while awaiting burial. with intent to sell the same, or dissect, without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 3, p. 114, L. 1889; amd. Sec. 511, Pen. C. 1895; re-en. Sec. 8362, Rev. C. 1907; re-en. Sec. 11033, R. C. M. 1921, Cal. Pen. C. Sec. 291.

Collateral References

Dead Bodies 7, 8. 25A C.J.S. Dead Bodies § 10. 22 Am. Jur. 2d 594, Dead Bodies, § 50.

94-4603. (11034) Who are charged with the duty of burial. The duty of burying the body of a deceased person devolves upon the persons hereinafter specified:

1. If the deceased was a married man or woman, the duty devolves upon the husband, or wife.

If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, if possessed of sufficient means to defray the necessary expenses.

If the deceased left no husband or kindred answering the foregoing description, the duty of burial devolves upon the coroner conducting an inquest upon the body of the deceased, if any such inquest is held; if there is none, then upon the persons charged with the support of the poor in the locality in which the death occurs.

4. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified, and if all omit to act it devolves upon the tenant, or if there is no tenant, then the owner of the premises or master, or if there is no master, upon the owner of the vessel in which the death occurs or the body is found.

History: En. Sec. 512, Pen. C. 1895; re-en. Sec. 8363, Rev. C. 1907; re-en. Sec. 11034, R. C. M. 1921. Cal. Pen. C. Sec. 292.

Collateral References

Dead Bodies 3.
25A C.J.S. Dead Bodies §§ 3, 5.
22 Am. Jur. 2d 559, 560, Dead Bodies,
§§ 6-8.

94-4604. (11035) Punishment for omitting to bury. Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law who omits to perform that duty within a reasonable time is guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead treble the expenses incurred by the latter in making the burial, to be recovered in a civil action.

History: En. Sec. 513, Pen. C. 1895; re-en. Sec. 8364, Rev. C. 1907; re-en. Sec. 11035, R. C. M. 1921. Cal. Pen. C. Sec. 293.

Collateral References

Dead Bodies \$\sim 7, 9.
25A C.J.S. Dead Bodies \$\sim 8, 9, 10.
22 Am. Jur. 2d 593, Dead Bodies, \sim 48.

94-4605. (11036) Who are entitled to custody of a body. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it, except that in the case in which an inquest is required to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed.

History: En. Sec. 514, Pen. C. 1895; re-en. Sec. 8365, Rev. C. 1907; re-en. Sec. 11036, R. C. M. 1921. Cal. Pen. C. Sec. 294.

Collateral References

Dead Bodies 1. 25A C.J.S. Dead Bodies § 2. 22 Am. Jur. 2d 560 et seq., Dead Bodies, § 9 et seq.

94.4606. (11037) Arresting or attaching a dead body. Every person who arrests or attaches any dead body of a human being, upon any debt or demand whatever, or detains, or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

History: En. Sec. 515, Pen. C. 1895; re-en. Sec. 8366, Rev. C. 1907; re-en. Sec. 11037, R. C. M. 1921. Cal. Pen. C. Sec. 295.

94-4607. (11038) Defacing tombs or monuments. Every person who willfully and maliciously defaces, breaks, destroys, or removes any tomb, monument, or gravestone erected to any deceased person, or any memento or memorial, or any ornamental plant, tree, or shrub appertaining to the place of burial of a human being, or who shall mark, deface, injure, destroy, or remove any fence, post, rail, or wall, of any cemetery or graveyard, is guilty of a misdemeanor.

History: En. Sec. 1, p. 114, L. 1889; amd. Sec. 516, Pen. C. 1895; re-en. Sec. 8367, Rev. C. 1907; re-en. Sec. 11038, R. C. M. 1921. Cal. Pen. C. Sec. 296.

Collateral References

Cemeteries \$22. 14 C.J.S. Cemeteries § 37. 14 Am. Jur. 2d 753, Cemeteries, § 44.

CHAPTER 47

PUNISHMENTS—ATTEMPTS AND OTHER GENERAL PROVISIONS

Section 94-4701. Acts made punishable by different provisions of this code.

94-4702. Acts punishable under foreign laws. 94-4703. Foreign conviction or acquittal.

94-4704.

Contempts, how punishable. Mitigation of punishment in certain cases. Aiding in misdemeanor. 94-4705.

94-4706.

94-4707. Sending letters, when deemed complete.

94-4708. Removal from office for neglect of official duty. 94-4709. Omission to perform duty, when punishable.

Attempts to commit crime, when punishable. Attempts to commit crime, how punishable. 94-4710. 94-4711.

94-4712. Commission of offense while unsuccessfully attempting another crime.

94-4713. Second offense, how punished after conviction of former offense. 94-4714. Second offense, how punished after conviction of attempt to commit a state prison offense.

94-4715. Foreign conviction for former offense.

94-4716 to 94-4717. Repealed. 94-4718. Imprisonment for life.

94-4719. Fine may be added to imprisonment. 94-4720. Civil rights of convict suspended.

94-4721. Civil death.

94-4722. Limitations to two preceding sections.

94-4723. Convict competent witness. 94-4724. Person of convict protected.

94-4725. Forfeitures.

94-4701. (11581) Acts made punishable by different provisions of this code. An act or omission which is made punishable in different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections 94-35-115, 94-4714 and 94-4715, the punishment therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment or information and found by the jury.

History: En. Sec. 1220, Pen. C. 1895; re-en. Sec. 8885, Rev. C. 1907; re-en. Sec. 11581, R. C. M. 1921. Cal. Pen. C. Sec. 654.

Operation and Effect

For a discussion of the history and application of this section, see State v. Marchindo, 65 M 431, 435, 211 P 1093.

Penalty in Addition to Others

Statute imposing penalty of \$1,000 for excess freight weight over 25,000 pounds is penalty in addition to other penalties provided by statute, is obligatory upon judge, is not violation either of double jeopardy provision of constitution or of this statute. State ex rel. Oleson v. District Court, 151 M 12, 438 P 2d 560.

Proof of Previous Conviction

A prior foreign conviction must be charged and proved before the court is bound to fix a minimum penalty based

thereon. State v. Brown, 136 M 382, 351 P 2d 219, 222.

Separate Offenses Arising from Same Transaction

Imposing two consecutive sentences upon defendant, one upon conviction of bur-glary for breaking and entering bar and other upon conviction of larceny in steal-ing beer from bar, was proper. Morigeau v. State, 149 M 85, 423 P 2d 60.

Sentencing defendant to two five-year terms to run concurrently based on convictions of second degree assault on two different people in same brawl was not violation of this statute which applies only to one indivisible transaction. State v. Manning, 149 M 517, 429 P 2d 625.

Collateral References

Criminal Law = 187, 1208 (3). 22 C.J.S. Criminal Law §§ 269, 270, 276; 24B C.J.S. Criminal Law § 1982. 21 Am. Jur. 2d 231 et seq., Criminal Law, § 165 et seq.

Law Review

Criminal Law: Consecutive Sentences

for Burglary and Larceny Committed in a Single Criminal Transaction (Morigeau v. State, 149 M 85, 423 P 2d 60), 28 Mont L Rev 254 (1967).

94-4702. (11582) Acts punishable under forcign laws. An act or omission declared punishable by this code is not less so because it is also punishable under the laws of another state, government, or country, unless the contrary is expressly declared.

History: En. Sec. 1221, Pen. C. 1895; re-en. Sec. 8886, Rev. C. 1907; re-en. Sec. 11582, R. C. M. 1921, Cal. Pen. C. Sec. 655. Collateral References Criminal Law 216. 22 C.J.S. Criminal Law § 16.

94-4703. (11583) Foreign conviction or acquittal. Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

History: En. Sec. 1222, Pen. C. 1895; re-en. Sec. 8887, Rev. C. 1907; re-en. Sec. 11583, R. C. M. 1921. Cal. Pen. C. Sec. 656.

Collateral References

Criminal Law 186, 187. 22 C.J.S. Criminal Law §§ 264-266, 268, 269, 270, 276. 21 Am. Jur. 2d 244, Criminal Law, § 191. Conviction or acquittal under federal statute as bar to prosecution under state or territorial statute, or vice versa. 16 ALR 1231; 22 ALR 1551 and 48 ALR 1106.

94-4704. (11584) **Contempts, how punishable.** A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt.

History: En. Sec. 1223, Pen. C. 1895; re-en. Sec. 8888, Rev. C. 1907; re-en. Sec. 11584, R. C. M. 1921. Cal. Pen. C. Sec. 657.

Collateral References
Criminal Law \$26.
22 C.J.S. Criminal Law § 37.

94-4705. (11585) Mitigation of punishment in certain cases. When it appears, at the time of passing sentence upon a person convicted upon indictment or information, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order judging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

History: En. Sec. 1224, Pen. C. 1895; re-en. Sec. 8889, Rev. C. 1907; re-en. Sec. 11585, R. C. M. 1921. Cal. Pen. C. Sec. 658.

Collateral References
Criminal Law©=1208 (1).
24B C.J.S. Criminal Law §§ 1980, 1986.

94-4706. (11586) Aiding in misdemeanor. Whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the commission of such act is expressly prescribed by law, every person who counsels or aids another in the commission of such act is guilty of a misdemeanor.

History: En. Sec. 1225, Pen. C. 1895; re-en. Sec. 8890, Rev. C. 1907; re-en. Sec. 11586, R. C. M. 1921. Cal. Pen. C. Sec. 659. Collateral References
Criminal Law 59 (5).
22 C.J.S. Criminal Law § 79.
21 Am. Jur. 2d 197, Criminal Law, § 119.

94-4707. (11587) Sending letters, when deemed complete. In the various cases in which the sending of a letter is made criminal by this code, the offense is deemed complete from the time when such letter is deposited in any post office, or any other place, or delivered to any person, with intent that it shall be forwarded.

History: En. Sec. 1226, Pen. C. 1885; re-en. Sec. 8891, Rev. C. 1907; re-en. Sec. 11587, R. C. M. 1921. Cal. Pen. C. Sec. 660.

94-4708. (11588) Removal from office for neglect of official duty. In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers—state, county, city, town, or township—where it is not so expressly provided, they may, in the discretion of the court, be removed from office.

History: En. Sec. 1227, Pen. C. 1895; re-en. Sec. 8892, Rev. C. 1907; re-en. Sec. 11588, R. C. M. 1921. Cal. Pen. C. Sec. 661.

Operation and Effect

This section does not restrain or limit power of governor to remove third member of unemployment compensation commission. State ex rel. Bonner v. District Court, 122 M 464, 206 P 2d 166, 171.

Collateral References

Officers 66. 67 C.J.S. Officers § 59 et seq. 43 Am. Jur. 40, Public Officers, § 196.

94-4709. (11589) Omission to perform duty, when punishable. No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

History: En. Sec. 1228, Pen. C. 1895; re-en. Sec. 8893, Rev. C. 1907; re-en. Sec. 11589, R. C. M. 1921. Cal. Pen. C. Sec. 662.

94-4710. (11590) Attempts to commit crime, when punishable. An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.

History: En. Sec. 1229, Pen. C. 1895; re-en. Sec. 8894, Rev. C. 1907; re-en. Sec. 1590, R. C. M. 1921. Cal. Pen. C. Sec. 663.

Completed Crime

One charged with an attempt to commit a crime (maiming of an animal) may properly be convicted as charged, under this section, even though the evidence shows that the crime was completed. State v. Benson, 91 M 21, 25, 5 P 2d 223.

Intent

Testimony of a witness that accused, charged with an attempt to rob, had so-

licited the witness some six days before the assault to join in committing robbery, was too remote to supply the basis for an inference of the specific intent required, under this section, to be present at the time of the alleged crime. State v. Hanson, 49 M 361, 368, 141 P 669.

Collateral References

Criminal Law \$\square\$-44.
22 C.J.S. Criminal Law \$\sqrt{9}\ 73, 75-77.
21 Am. Jur. 2d 188, Criminal Law, \sqrt{1}\ 110.

94-4711. (11591) Attempts to commit crime, how punishable. Every person who attempts to commit any crime, but fails, or is prevented or in-

tercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

- 1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.
- 2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.
- 3. If the offense so attempted is punishable by a fine, the offender convicted of such an attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction for the offense so attempted.
- 4. If the offense so attempted is punishable by a fine and imprisonment, the offender convicted of such attempt may be punished by both such imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

History: Ap. p. Sec. 191, p. 314, Cod. Stat. 1871; re-en. Sec. 218, 4th Div. Rev. Stat. 1879; re-en. Sec. 285, 4th Div. Comp. Stat. 1887; en. Sec. 1230, Pen. C. 1895; re-en. Sec. 8895, Rev. C. 1907; re-en. Sec. 11591, R. C. M. 1921. Cal. Pen. C. Sec. 664.

County Authority

In view of this section and of section 94-4118 and of section 94-4718, the court had authority to fix punishment of one found guilty of attempt to commit the infamous crime against nature, at fifteen years, since, in its discretion, it could have sentenced defendant, if guilty of the infamous crime itself, to term of thirty years, and hence could, with propriety, fix one-half that term upon conviction for attempt. State v. Stone, 40 M 88, 92, 105 P 89.

Presumption That Punishment Properly Fixed

Where the evidence is not before the appellate court, it will be presumed that the trial court properly fixed the punish-

ment on a conviction for attempt to commit burglary. State v. Mish, 36 M 168, 175, 92 P 459.

Collateral References

Criminal Law 5 1208 (7). 24B C.J.S. Criminal Law § 1987.

What amounts to attempt to manufacture intoxicating liquor within criminal law. 22 ALR 225.

What constitutes attempt to commit robbery. 55 ALR 714.

What conduct amounts to an overt act or act done toward commission of murder so as to sustain charge of attempt to murder. 98 ALR 918.

Attempt to obtain money under false pretenses predicated upon receipt or claim of benefits under insurance policy. 135 ALR 1157.

Pregnancy as element of abortion or homicide based thereon. 46 ALR 2d 1393.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 ALR 3d 241.

94-4712. (11592) Commission of offense while unsuccessfully attempting another crime. The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

History: En. Sec. 1231, Pen. C. 1895; re-en. Sec. 8896, Rev. C. 1907; re-en. Sec. 1592, R. C. M. 1921. Cal. Pen. C. Sec. 665.

Collateral References

Criminal Law 344. 22 C.J.S. Criminal Law §§ 73, 75-77.

- 94-4713. (11593) Second offense, how punished after conviction of former offense. Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:
- 1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years.
- 2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding ten years.
- 3. If the subsequent conviction is for petit larceny, or any attempt to commit an offense which, if committed, would be punishable by imprisonment in the state prison not exceeding five years, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1232, Pen. C. 1895; re-en. Sec. 8897, Rev. C. 1907; re-en. Sec. 11593, R. C. M. 1921. Cal. Pen. C. Sec. 666.

Cross-Reference

Charging an offense, prior conviction, sec. 95-1506.

Charge of Previous Conviction

Charging the defendant with a prior conviction of a felony did not deprive him of a fair trial. Petition of Noller, 143 M 301, 387 P 2d 301.

Identity of Person under Prior Conviction

Before a person can be convicted of the former convictions there must be proof aside from the judgment of prior convictions that the person convicted was in fact the defendant. State v. Nelson, 130 M 466, 304 P 2d 1110, 1115.

Lewd and Lascivious Act upon a Child

Defendant convicted of a lewd and lascivious act upon a child under section 94-4106, which carried a penalty of imprisonment not exceeding 25 years, was properly sentenced to a term of not less than 10 years on a subsequent offense, pursuant to subd. 1 of this section, where the jury found that he had previously been convicted of lewd and lascivious acts upon a child. In re Davis' Petition, 139 M 622, 365 P 2d 948, 949.

Operation and Effect

Judgment that defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a

felony as by the statute made and provided," was not void as to the five years for former conviction. The division of the term into equal parts, and the assignment of each part to its supposed function as a measure of punishment was merely redundant, and not ground for reversal. State v. Connors, 27 M 227, 228, 70 P 715.

measure of punishment was merely redundant, and not ground for reversal. State v. Connors, 27 M 227, 228, 70 P 715.

A sentence to fifty years' imprisonment of one convicted of robbery, who is also found to have been previously convicted in another state of burglary, is warranted by the law. State v. Paisley, 36 M 237, 248, 92 P 566.

Pleading of Prior Conviction

When a prior conviction is set forth in the information it does not constitute a second prosecution for a public offense for which defendant has once been prosecuted. In re Bean's Petition, 139 M 625, 365 P 2d 936, 937.

Proof of Nature of Crime

When a judgment of prior conviction is offered as evidence the state must prove that the crime involved was a felony within the meaning of this section. State v. Nelson, 130 M 466, 304 P 2d 1110, 1115.

Proof of Previous Conviction

A prior foreign conviction must be charged and proved before the court is bound to fix a minimum penalty based thereon. State v. Brown, 136 M 382, 351 P 2d 219, 222.

It was not a denial of fair trial to allow jury to consider the proven and admitted fact that the defendant in a first degree assault case had been convicted of three prior felonies, where only one would have served to increase the punishment under this section, when jury was instructed that the prior convictions were to be considered only in fixing the punishment, if and when the defendant was found guilty of the assault charge. Petition of Jones, 144 M 13, 393 P 2d 780.

Where record indicated that petitioner for writ of habeas corpus had sustained a prior felony conviction and that under this section he might have received the same sentence for second degree burglary with a prior offense as he did receive for first degree burglary, it did not show that petitioner was not prejudiced by not being fully informed as to the difference between first and second degree burglary, as a prior conviction was not charged or established. Jones v. State, 235 F Supp 673, 678.

Collateral References

Criminal Law № 1211. 24B C.J.S. Criminal Law § 1973. 39 Am. Jur. 2d 308 et seq., Habitual Criminals and Subsequent Offenders, § 1 et seq.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 ALR 20; 82 ALR 345; 116 ALR 209; 132 ALR 91 and 139 ALR 673.

Law Review

Informing Jury of Defendant's Prior Conviction at Commencement of Trial Pursuant to Habitual Criminal Statute Violated Due Process (Lane v. Warden, Maryland Penitentiary, 320 F 2d 179 (4th Cir.), 25 Mont L Rev 250 (1964).

DECISIONS UNDER FORMER LAW

Jury's Knowledge of Prior Convictions

Permitting jury to learn of defendant's three prior convictions, which were admitted by him, was not error in view of former statute requiring county attorney to state the case and offer evidence in support of the prosecution and fact that without such knowledge the jury could not intelligently fix the punishment to the crime as was formerly its duty. State v. O'Meill, 76 M 526, 534, 248 P 215.

- 94-4714. (11594) Second offense, how punished after conviction of attempt to commit a state prison offense. Every person who, having been convicted of petit larceny, or attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable as follows:
- 1. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life.
- 2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for any term less than life, such person is punishable by imprisonment in such prison for the longest term prescribed upon a conviction for such first offense.
- 3. If the subsequent conviction is for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the state prison, then such person is punishable by imprisonment in such prison not exceeding five years.

History: En. Sec. 1233, Pen. C. 1895; re-en. Sec. 8898, Rev. C. 1907; re-en. Sec. 11594, R. C. M. 1921. Cal. Pen. C. Sec. 667.

94-4715. (11595) Foreign conviction for former offense. Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed in this state in the manner prescribed in the

last two sections, and to the same extent as if such first conviction had taken place in a court of this state.

History: En. Sec. 1234, Pen. C. 1895; re-en. Sec. 8899, Rev. C. 1907; re-en. Sec. 1595, R. C. M. 1921. Cal. Pen. C. Sec. 668.

Identity of Person under Prior Conviction

Before a person can be convicted of the former convictions there must be proof aside from the judgment of prior convictions that the person convicted was in fact the defendant. State v. Nelson, 130 M 466, 304 P 2d 1110, 1115.

Operation and Effect

It is immaterial whether the crime for which the defendant is alleged to have been previously convicted is a felony in the foreign state. State v. Paisley, 36 M 237, 247, 92 P 566.

Proof of Conviction

A prior foreign conviction must be charged and proved before the court is bound to fix a minimum penalty based thereon. State v. Brown, 136 M 382, 351 P 2d 219, 222.

Proof of Nature of Crime

When a judgment of prior conviction is offered as evidence, the state must prove that crime involved was a felony within meaning of this section. State v. Nelson, 130 M 466, 304 P 2d 1110, 1115.

Collateral References

Criminal Law \$\iiin 1202 (1).
24B C.J.S. Criminal Law \$\sqrt{1960}, 1964.
39 Am. Jur. 2d 321, Habitual Criminals
and Subsequent Offenders, \$\sqrt{16}.

94-4716. (11596) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-4716 (Sec. 1235, Pen. C. 1895), relating to the commencement of subsequent terms of imprisonment upon

conviction of two or more crimes, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2206 and 95-2213.

94-4716.1. Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-4716.1 (Sec. 1, Ch. 130, L. 1961), relating to commencement of term for offense committed by prisoner under

sentence, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2206 and 95-2213.

94-4717. (11597) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-4717 (Sec. 1236, Pen. C. 1895), relating to time term of imprison-

ment commences, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2206 and 95-2213.

94-4718. (11598) Imprisonment for life. Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.

History: En. Sec. 1237, Pen. C. 1895; re-en. Sec. 8902, Rev. C. 1907; re-en. Sec. 11598, R. C. M. 1921, Cal. Pen. C. Sec. 671.

Collateral References

Criminal Law \$\infty 1208 (4). 24B C.J.S. Criminal Law \$\\$ 1980, 1986. 21 Am. Jur. 2d 551, Criminal Law, \$\\$ 592.

94-4719. (11599) Fine may be added to imprisonment. Upon conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the punishment prescribed.

History: En. Sec. 1238, Pen. C. 1895; re-en. Sec. 8903, Rev. C. 1907; re-en. Sec. 11599, R. C. M. 1921, Cal. Pen. C. Sec. 672.

Collateral References

Criminal Law 21215. 24B C.J.S. Criminal Law § 1975. 21 Am. Jur. 2d 555, Criminal Law, § 599.

94-4720. (11600) Civil rights of convict suspended. A sentence of imprisonment in the state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during such imprisonment. The governor has power to restore to citizenship any person convicted of any offense committed against the laws of the state, upon cause being shown, either after the expiration of sentence, or after pardon. The governor may request an investigation by the board of pardons to determine if such restoration to citizenship be advisable.

History: En. Sec. 154, p. 217, Bannack Stat.; re-en. Sec. 186, p. 313, Cod. Stat. 1871; re-en. Sec. 213, 4th Div. Rev. Stat. 1879; re-en. Sec. 279, 4th Div. Comp. Stat. 1887; amd. Sec. 1239, Pen. C. 1895; re-en. Sec. 8904, Rev. C. 1907; re-en. Sec. 11600, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1955. Cal. Pen. C. Sec. 673.

Incompetency as Juror Waived

Where counsel had the opportunity to inquire into the qualifications of a juror, and exercised that right, but failed to inquire whether he had ever been convicted of a felony, he will be held to have

waived any objection thereto even though knowledge of the juror's incompetency did not come to counsel until after the trial. Stagg v. Stagg, 96 M 573, 598, 32 P 2d 856.

Collateral References

Convicts € 2, 4. 18 C.J.S. Convicts § 2, 4. 41 Am. Jur. 912-914, Prisons and Prisoners, § 38-40.

Conviction in federal court, or in court of another state or country, as disqualification to vote at election. 149 ALR 1075.

94-4721. (11601) Civil death. A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead.

History: En. Sec. 1240, Pen. C. 1895; re-en. Sec. 8905, Rev. C. 1907; re-en. Sec. 11601, R. C. M. 1921. Cal. Pen. C. Sec. 674.

94-4722. (11602) Limitations to two preceding sections. The provisions of the last two preceding sections must not be construed to render the person therein mentioned incapable of making and acknowledging a sale or conveyance of property.

History: En. Sec. 1241, Pen. C. 1895; re-en. Sec. 8906, Rev. C. 1907; re-en. Sec. 11602, R. C. M. 1921. Cal. Pen. C. Sec. 675.

Collateral References

Convicts \$3. 18 C.J.S. Convicts §5. 41 Am. Jur. 914, Prisons and Prisoners, §40.

94-4723. (11603) Convict competent witness. A person convicted of any offense is notwithstanding a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his examination as such witness.

History: En. Sec. 1242, Pen. C. 1895; re-en. Sec. 8907, Rev. C. 1907; re-en. Sec. 11603, R. C. M. 1921. See Cal. Pen. C. Sec. 675. See also Sec. 714, N. Y. Penal Code.

Only Felony Affects Weight of Testimony

Provision that witness' former conviction may be proved for purpose of affecting weight of his testimony, refers to conviction of a felony, and therefore refusal to permit cross-examination of wit-

ness for state as to his former conviction of a misdemeanor was proper. State v. Stein, 60 M 441, 446, 199 P 278.

Proper Method to Impeach

Where defendant upon cross-examination admits his prior convictions of felonies it is error to then allow state to introduce into evidence the judgment record of prior convictions, for it serves no useful purpose since the credibility has already been impeached and it may weigh too heavily against the defendant. State v. Coloff, 125 M 31, 231 P 2d 343, 344.

Testimony of Accomplice

An accomplice may testify in a criminal case even if he is a convicted felon. State v. Barick, 143 M 273, 389 P 2d 170.

Collateral References

Witnesses 48 (1), 345 (1).
97 C.J.S. Witnesses § 65 et seq.; 98 C.J.S. Witnesses § 491 et seq.
58 Am. Jur. 397 et seq., Witnesses, § 734 et seq.

Constitutionality of statute restoring competency of convict as a witness. 63 ALR 982.

94-4724. (11604) Person of convict protected. The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced.

History: En. Sec. 1243, Pen. C. 1895; re-en. Sec. 8908, Rev. C. 1907; re-en. Sec. 11604, R. C. M. 1921. Cal. Pen. C. Sec. 676.

94-4725. (11605) Forfeitures. No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the state, in the nature of a deodand, or where any person shall flee from justice, are abolished.

History: En. Sec. 1244, Pen. C. 1895; re-en. Sec. 8909, Rev. C. 1907; re-en. Sec. 11605, R. C. M. 1921. Cal. Pen. C. Sec. 677.

Collateral References

Criminal Law 21205. 24B C.J.S. Criminal Law 11974. 41 Am. Jur. 914, Prisons and Prisoners, 40.

CHAPTER 48

RIGHTS OF DEFENDANT

Section 94-4801. No person punishable but on legal conviction.

94-4802. Public offenses, how prosecuted.

94-4803. Repealed.

94-4804. Parties to a criminal action.

94-4805. Repealed.

94-4806. Rights of defendant in a criminal action.

94-4807. Repealed.

94-4808. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

94-4809. No person to be convicted but upon verdict or judgment.

94-4801. (11606) No person punishable but on legal conviction. No person can be punished for a pubic offense, except upon a legal conviction in a court having jurisdiction thereof.

History: En. Sec. 1350, Pen. C. 1895; re-en. Sec. 8910, Rev. C. 1907; re-en. Sec. 11606, R. C. M. 1921. Cal. Pen. C. Sec. 681.

Collateral References

Criminal Law \$83. 22 C.J.S. Criminal Law § 107.

Duty to advise accused as to right to assistance of counsel, 3 ALR 2d 1003.

94-4802. (11607) Public offenses, how prosecuted. Every public offense must be prosecuted by indictment or information, except—

- 1. Where proceedings are had for the removal of civil officers of the state;
- 2. Offenses arising in the militia when in actual service and in the land and naval forces in time of war, or which the state may keep, with the consent of Congress, in time of peace;
 - 3. Offenses tried in justices' and police courts.

History: En. Sec. 1351, Pen. C. 1895; re-en. Sec. 8911, Rev. C. 1907; re-en. Sec. 11607, R. C. M. 1921, Cal. Pen. C. Sec. 682.

Collateral References

Indictment and Information €= 3. 42 C.J.S. Indictments and Informations § 9.

94-4803. (11608) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-4803 (Sec. 1, p. 189, Cod. Stat. 1871), defining a criminal action,

was repealed by Sec. 2, Ch. 196, Laws 1967.

94-4804. (11609) Parties to a criminal action. A criminal action is prosecuted in the name of the state of Montana as a party, against the person charged with the offense.

History: Earlier acts were Sec. 2, p. 189, Cod. Stat. 1871; re-en. Sec. 2, 3d Div. Rev. Stat. 1879; re-en. Sec. 2, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1353, Pen. C. 1895; re-en. Sec. 8913, Rev. C. 1907; re-en. Sec. 11609, R. C. M. 1921. Cal. Pen. C. Sec. 684.

Operation and Effect

In criminal case, state is opposite party to defendant, and former section 93-

1901-9, relating to calling the opposite party, is not applicable to a criminal proceeding. State v. Moorman, 133 M 148, 321 P 2d 236, 238.

Collateral References

Indictment and Information \$\infty\$=26.
42 C.J.S. Indictments and Informations § 41.

94-4805. (11610) Repealed—Chapter 196. Laws of 1967.

Repeal

Section 94-4805 (Sec. 1354, Pen. C. 1895), designating party prosecuted in a criminal

action as the defendant, was repealed by Sec. 2, Ch. 196, Laws 1967.

94-4806. (11611) Rights of defendant in a criminal action. In all criminal prosecutions the accused shall have the right—

- 1. To appear and defend in person and by counsel;
- 2. To demand the nature and cause of the action;
- 3. To meet the witnesses against him face to face;
- 4. To have process to compel the attendance of witnesses in his behalf;
- 5. A speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

History: Earlier acts were Sec. 9, p. 190, Cod. Stat. 1871; re-en. Sec. 9, 3d Div. Rev. Stat. 1879; re-en. Sec. 9, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1355, Pen. C. 1895; re-en. Sec. 8915, Rev. C. 1907; re-en. Sec. 11611, R. C. M. 1921. Cal. Pen. C. Sec. 686.

Cross-Reference

Right to counsel, sec. 95-1001,

Discharge of Court-appointed Counsel

Where court-appointed counsel failed to advise clerk's office as to what would be required for record on appeal from conviction of burglary and there was no record before the supreme court, defendant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the district court for revocation of appointment of counsel and appointment of competent and effective counsel to properly prosecute the appeal. State v. Bubnash, 139 M 517, 366 P 2d 155, 158.

Where defendant charged with burglary was granted the services of court-appointed counsel he did not have the right to discharge such counsel unless he was able to provide counsel at his own expense or desired to undertake his own defense. However, upon a proper showing, such counsel could be discharged by the trial court. Peters v. State, 139 M 634, 366 P

2d 158, 159.

Examination of Witnesses in Open Court

Where defendant pleaded guilty to grand larceny, the extent of his punishment should have been determined under section 94-2706 by the exercise of a sound discretion on the part of the trial judge after the circumstances had been "presented by the testimony of witnesses examined in open court." Kuhl v. District Court, 139 M 536, 366 P 2d 347, 362.

Impartial Jury

Trial court was in error for refusing to grant defendant a change of venue where evidence disclosed that local newspaper had fanned feeling of community against defendant, that local people believed defendant to be guilty, and that county officials themselves felt that feeling against defendant was so high that they moved him for safety to state prison. State v. Dryman, 127 M 579, 269 P 2d 796, 800. (Dissenting opinion, 127 M 579, 269 P 2d 796, 801.)

Operation and Effect

Under statute providing that accused is entitled to meet witnesses against him face to face, it was error where the prosecuting witness was not within the state, to admit in evidence the committing magistrate's general recollection of the testi-mony which such witness gave at the preliminary examination. State v. Lee, 13 M 248, 249, 33 P 690. See also State v. Byers, 16 M 565, 569, 41 P 708; State v.

Vanella, 40 M 326, 336, 106 P 364.
At the date of the adoption of the constitution, in 1889, while the right to a

trial by jury existed by virtue of the territorial statutes in all cases of felonies and misdemeanors, it did not exist under the provisions of the statutes in force for the prevention of public offenses, and there has not been any change in this respect. State ex rel. Jackson v. Kennie, 24 M 45, 57, 60 P 589.

Right To Appear and Defend by Counsel

A defendant is guaranteed counsel by appointment of the court, if he cannot himself employ an attorney. It is equally the duty of the court to make the appointment of counsel effective, i. e., to give court-appointed counsel a reasonable time for the preparation of his case after he has been appointed. State v. Blakeslee, 131 M 47, 306 P 2d 1103, 1107. (Dissenting opinion, 131 M 47, 306 P 2d 1103, 1107.)

Where counsel was appointed by court, after withdrawal of defendant's original counsel, but trial was commenced three days after such appointment, such appointment was made purposeless as it is the duty of the court to make the appointment effective by giving a reasonable time for preparation of case. State v. Blake-slee, 131 M 47, 306 P 2d 1103, 1107. (Dissenting opinion, 131 M 47, 306 P 2d 1103, 1107.)

Collateral References

Criminal Law 573, 635, 641 (1), 662 (1); Indictment and Information 56; Jury 21 (1); Witnesses 2 (1-4).

22A C.J.S. Criminal Law § 466; 23 C.J.S. Criminal Law § 963, 979, 981, 1006, 1008; 42 C.J.S. Indictments and Informations § 90; 50 C.J.S. Juries §§ 48, 76; 97 C.J.S. Witnesses § 6 et seq.

21 Am. Jur. 2d 272 et seq., Criminal Law § 340; 25 C.J.S.

Law § 234 et seq.

Use in criminal case of testimony given on former trial, or preliminary examina-tion, by witness not available at present trial. 15 ALR 495; 79 ALR 1392; 122 ALR 425 and 159 ALR 1240.

Right of defendant in criminal case to conduct defense in person. 17 ALR 266 and 77 ALR 2d 1233.

Presence of accused during view by jury. 30 ALR 1357 and 90 ALR 597.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf. 33 ALR 826.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case. 42 ALR 1157.

Remedy for delay in bringing accused to trial or to retrial after reversal. 58

ALR 1510.

Right to take fingerprints and photographs of accused before trial, or to retain same in police record after acquittal or discharge of accused. 83 ALR 127.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel. 84 ALR 544.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 ALR 377.

Brief voluntary absence of defendant from courtroom during trial of criminal case as ground of error. 100 ALR 478.

Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense. 118 ALR 1037.

Waiver or loss of defendant's right to speedy trial in criminal case. 129 ALR 572 and 57 ALR 2d 302.

Right of accused to have evidence interpreted to him. 140 ALR 766.

Relief in habeas corpus for violation of accused's right to assistance of counsel. 146 ALR 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a co-defendant. 148 ALR 183.

Plea of guilty without advice of counsel. 149 ALR 1403.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books

or papers. 152 ALR 1208.
Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction.

154 ALR 994.

Exclusion of public during trial, 156 ALR 265 and 48 ALR 2d 1436.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him. 157 ALR 1225. Fingerprints, palm prints, or bare foot-

prints as evidence. 28 ALR 2d 1115.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR 3d 1360.

94-4807. (11612) Repealed—Chapter 228, Laws of 1969.

Repeal

Section 94-4807 (Sec. 10, p. 190, Cod. Stat. 1871; Sec. 1356, Pen. C. 1895), prohibiting a second prosecution for the same offense, was repealed by Sec. 6, Ch. 228, Laws 1969. For present law, see sec. 94-6808.3.

94-4808. (11613) No person to be a witness against himself in a criminal action or to be unnecessarily restrained. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

History: En. Secs. 11, 12, p. 190, Cod. Stat. 1871; re-en. Secs. 11, 12, 3d Div. Rev. Stat. 1879; re-en. Secs. 11, 12, 3d Div. Comp. Stat. 1887; re-en. Sec. 1357, Pen. C. 1895; re-en. Sec. 8917, Rev. C. 1907; re-en. Sec. 11613, R. C. M. 1921. Cal. Pen. C. Sec.

Collateral References

Criminal Law 393 (1), 637; Witnesses

22A C.J.S. Criminal Law §§ 654-656; 23 C.J.S. Criminal Law § 977.

21 Am. Jur. 2d 378 et seq., Criminal Law, § 349 et seq.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers. 152 ALR 1208.

Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 ALR 994.

94-4809. (11614) No person to be convicted but upon verdict or judgment. No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment of a court, a jury having been waived, in a criminal case not amounting to felony.

History: En. Sec. 1358, Pen. C. 1895; re-en. Sec. 8918, Rev. C. 1907; re-en. Sec. 11614, R. C. M. 1921. Cal. Pen. C. Sec. 689.

Collateral References Jury \$21-24. 50 C.J.S. Juries § 75 et seq. Plea of guilty as affected by objection that it was not made by defendant personally. 110 ALR 1300.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 ALR 2d 549.

CHAPTER 49

DEFINITIONS—PROSECUTION OF CRIMINAL ACTIONS—JURISDICTION OF COURTS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-4901 to 94-4917. (11615 to 11631) Repealed.

Sections 94-4901 to 94-4917 (Sec. 1, p. 248, L. 1891; Secs. 1370 to 1375, 1380 to 1388, 1400, 1401, Pen. C. 1895), defining terms and dealing with prosecutions and

jurisdiction, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-203, 95-208, 95-210, 95-301, 95-302, 95-902, 95-1301, 95-1302, 95-1501, 59-1502, and

CHAPTER 50

LAWFUL RESISTANCE—INTERVENTION OF OFFICERS OF JUSTICE

Section 94-5001. Lawful resistance, by whom made.

94-5002. By the party, in what cases and to what extent.
94-5003. By other parties, in what cases.
94-5004. Interportion of officers in what

Intervention of officers, in what cases.

94-5005. Persons acting in their aid justified.

(11632) Lawful resistance, by whom made. Lawful resistance to the commission of a public offense may be made—

- By the party about to be injured;
- By other parties.

History: En. Sec. 1410, Pen. C. 1895; re-en. Sec. 8936, Rev. C. 1907; re-en. Sec. 11632, R. C. M. 1921, Cal. Pen. C. Sec. 692.

Collateral References

Assault and Battery \$\infty\$ 67-69; Homicide @m107.

6 C.J.S. Assault and Battery §§ 92-94; 40 C.J.S. Homicide § 101.

- (11633) By the party, in what cases and to what extent. Resistance sufficient to prevent the offense may be made by the party about to be injured—
- To prevent an offense against his person, or his family, or some member thereof;
- 2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

History: Ap. p. Sec. 13, p. 191, Cod. Stat. 1871; re-en. Sec. 13, 3d Div. Rev. Stat. 1879; re-en. Sec. 13, 3d Div. Comp. Stat. 1887; en. Sec. 1411, Pen. C. 1895; re-en. Sec. 8937, Rev. C. 1907; re-en. Sec. 11633, R. C. M. 1921. Cal. Pen. C. Sec. 693.

Use of Excessive Force

In prosecution for first degree assault, defendant who fired bullet through apartment door striking investigating police

officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force and was properly convicted. State v. Lukus, 149 M 45, 423 P 2d 49.

Collateral References

Assault and Battery@=13-15, 67-69;

Homicide 107 et seq. 6 C.J.S. Assault and Battery §§ 18-20, 92-94; 40 C.J.S. Homicide § 101 et seq.

94-5003. (11634) By other parties, in what cases. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

History: Ap. p. Sec. 13, p. 191, Cod. Stat. 1871; re-en. Sec. 13, 3d Div. Rev. Stat. 1879; re-en. Sec. 13, 3d Div. Comp. Stat. 1887; en. Sec. 1412, Pen. C. 1895; re-en. Sec. 8938, Rev. C. 1907; re-en. Sec. 11634, R. C. M. 1921. Cal. Pen. C. Sec. 694.

94-5004. (11635) Intervention of officers, in what cases. Public offenses may be prevented by the intervention of the officers of justice—

- 1. By requiring security to keep the peace;
- 2. By forming a police in cities and towns, and by requiring their attendance in exposed places:
 - 3. By suppressing riots.

History: En. Sec. 1420, Pen. C. 1895; re-en. Sec. 8939, Rev. C. 1907; re-en. Sec. 11635, R. C. M. 1921. Cal. Pen. C. Sec. 697.

Collateral References

Breach of the Peace =16; Municipal Corporations 180 (1); Riot 9. 11 C.J.S. Breach of the Peace § 17; 62 C.J.S. Municipal Corporations § 563; 77 C.J.S. Riot § 30 et seq.

94-5005. (11636) Persons acting in their aid justified. When the officers of justice are authorized to act in the prevention of public offenses, other persons, who, by their command, act in their aid, are justified in so doing.

History: En. Sec. 1421, Pen. C. 1895; re-en. Sec. 8940, Rev. C. 1907; re-en. Sec. 11636, R. C. M. 1921. Cal. Pen. C. Sec. 698.

Collateral References

Sheriffs and Constables 27. 80 C.J.S. Sheriffs and Constables § 34.

CHAPTER 51

SECURITY TO KEEP THE PEACE

Section 94-5101. Information of threatened offense.

94-5102. Examination of complainant and witnesses.

94-5103. Warrant of arrest.

94-5104. Proceedings on charge being control.
94-5105. Person complained of, when to be discharged.

Security to keep the peace, when required.

94-5107. Effect of giving or refusing to give security.

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94-5109. 94-5110. Undertaking to be filed in clerk's office.

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Undertaking, when broken. 94-5111.

Undertaking, when and how to be prosecuted. Evidence of breach. 94-5112.

94-5113. 94-5114.

Costs taxed against complainant.

94-5115. Appeal by complainant.

94-5116. Security for the peace.

94-5101. (11637) Information of threatened offense. A complaint may be laid before any of the magistrates mentioned in section 94-4905, that a person has threatened to commit an offense against the person or property of another.

History: Earlier acts relating to giving security to keep the peace were Secs. 1-11, pp. 218-220, Bannack Stat.; re-en. Secs. 20-29, pp. 192-193, Cod. Stat.. 1871; re-en. Secs. 20-29, 3d Div. Rev. Stat. 1879; re-en. Secs. 20-29, 3d Div. Comp. Stat. 1887. This section en. Sec. 1430, Pen. C. 1895; re-en. Sec. 8941, Rev. C. 1907; re-en. Sec. 11637, R. C. M. 1921. Cal. Pen. C. Sec. 701.

Compiler's Note

Section 94-4905, stating persons who were magistrates, was repealed by Sec. 2, Ch. 196, Laws 1967.

No Right to Jury Trial

The person complained of is not entitled to a jury trial in a proceeding to compel him to give security to keep the peace. State ex rel. Jackson v. Kennie, 24 M 45, 56, 60 P 589.

Operation and Effect

The fact that the defendant, in a prosecution for murder, had the deceased arrested and confined in peace proceedings, does not supply any motive for the murder; on the contrary, it tends to show the absence of motive. State v. Suitor, 43 M 31, 45, 114 P 112.

Collateral References

Breach of the Peace 20.
11 C.J.S. Breach of the Peace 22.
12 Am. Jur. 2d 668, Breach of Peace and Disorderly Conduct, 7.

94-5102. (11638) Examination of complainant and witnesses. When the complaint is laid before such magistrate, he must examine on oath the complainant, and any witness he may produce, and must take their testimony in writing, and cause them to subscribe the same.

History: En. Sec. 1431, Pen. C. 1895; re-en. Sec. 8942, Rev. C. 1907; re-en. Sec. 11638, R. C. M. 1921, Cal. Pen. C. Sec. 702.

94-5103. (11639) Warrant of arrest. If it appears upon such examination that there is just reason to fear the commission of the offense threatened, by the person so complained of, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, marshal, or policeman in the state, reciting the substance of the complaint, and commanding the officer forthwith to arrest the person complained of and bring him before the magistrate.

History: En. Sec. 1432, Pen. C. 1895; re-en. Sec. 8943, Rev. C. 1907; re-en. Sec. 11639, R. C. M. 1921. Cal. Pen. C. Sec. 703.

94-5104. (11640) Proceedings on charge being controverted. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced in writing, and subscribed by the witnesses.

History: En. Sec. 1433, Pen. C. 1895; re-en. Sec. 8944, Rev. C. 1907; re-en. Sec. 11640, R. C. M. 1921. Cal. Pen. C. Sec. 704.

94-5105. (11641) Person complained of, when to be discharged. If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

History: En. Sec. 1434, Pen. C. 1895; re-en. Sec. 8945, Rev. C. 1907; re-en. Sec. 11641, R. C. M. 1921. Cal. Pen. C. Sec. 705.

94-5106. (11642) Security to keep the peace, when required. If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace toward the state, and particularly toward the complainant. The undertaking is valid and binding for one

year, and may, upon the renewal of the complaint, be extended for a longer period, or a new undertaking may be required.

History: En. Sec. 1485, Pen. C. 1895; re-en. Sec. 8946, Rev. C. 1907; re-en. Sec. 11642, R. C. M. 1921. Cal. Pen. C. Sec. 706. 11 C.J.S. Breach of the Peace § 21. 12 Am. Jur. 2d 692 et seq., Breach of Peace and Disorderly Conduct, § 41 et seq.

Collateral References
Breach of the Peace 17.

Reasonableness of amount required for bond to keep peace. 93 ALR 304.

94-5107. (11643) Effect of giving or refusing to give security. If the undertaking required by the last section is given, the party complained of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the cause of commitment, the requirement to give security, the amount thereof, and the omission to give the same.

History: En. Sec. 1436, Pen. C. 1895; re-en. Sec. 8947, Rev. C. 1907; re-en. Sec. 11643, R. C. M. 1921. Cal. Pen. C. Sec. 707.

tion in an action for damages for false imprisonment. Folsom v. Fisco, 62 M 194, 198, 204 P 367.

Defective Commitment

A commitment which failed to state that the accused had not given security, and which was not directed to the sheriff and did not contain any direction as to what he should do under it was so defective as to afford the sheriff no protec-

Term of Imprisonment Need Not Be Specified

An order of commitment is not insufficient because it does not fix the term of the imprisonment. State ex rel. Jackson v. Kennie, 24 M 45, 55, 60 P 589.

94-5108. (11644) Person committed for not giving security. If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate, upon giving the same.

History: En. Sec. 1437, Pen. C. 1895; re-en. Sec. 8948, Rev. C. 1907; re-en. Sec. 11644, R. C. M. 1921, Cal. Pen. C. Sec. 708,

94-5109. (11645) Undertaking to be filed in clerk's office. The undertaking must be filed by the magistrate in the office of the clerk of the district court.

History: En. Sec. 1438, Pen. C. 1895; re-en. Sec. 8949, Rev. C. 1907; re-en. Sec. 11645, R. C. M. 1921. Cal. Pen. C. Sec. 709.

94-5110. (11646) Security required for assault committed in court. A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security, as in this chapter provided, and if he refuse so to do, may be committed as provided in section 94-5107.

History: En. Sec. 1439, Pen. C. 1895; re-en. Sec. 8950, Rev. C. 1907; re-en. Sec. 11646, R. C. M. 1921. Cal. Pen. C. Sec. 710.

Collateral References
Breach of the Peace 27.
11 C.J.S. Breach of the Peace § 18.

94-5111. (11647) Undertaking, when broken. Upon the conviction of the person complained against of a breach of the peace, the undertaking is broken.

History: En. Sec. 1440, Pen. C. 1895; re-en. Sec. 8951, Rev. C. 1907; re-en. Sec. 11647, R. C. M. 1921. Cal. Pen. C. Sec. 711. 11 C.J.S. Breach of the Peace § 26. 12 Am. Jur. 2d 695, Breach of Peace and Disorderly Conduct, § 45.

Collateral References
Breach of the Peace 22.

What constitutes breach of peace bond. 54 ALR 388.

94-5112. (11648) Undertaking, when and how to be prosecuted. Upon the county attorney's producing evidence of such conviction to the district court of the county, the court must order the undertaking to be prosecuted, and the county attorney must thereupon commence an action upon it in the name of the state.

History: En. Sec. 1441, Pen. C. 1895; re-en. Sec. 8952, Rev. C. 1907; re-en. Sec. 11648, R. C. M. 1921. Cal. Pen. C. Sec. 712.

94-5113. (11649) Evidence of breach. In the action, the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach.

History: En. Sec. 1442, Pen. C. 1895; re-en. Sec. 8953, Rev. C. 1907; re-en. Sec. 11649, R. C. M. 1921. Cal. Pen. C. Sec. 713.

94-5114. (11650) Costs taxed against complainant. When any person complained of is discharged by the magistrate, if it appears that the prosecution was malicious, or that there were no reasonable grounds for the complaint, it is the duty of the magistrate to adjudge that the complainant pay all costs of the proceedings, and judgment must thereupon be entered against him.

History: En. Sec. 1443, Pen. C. 1895; re-en. Sec. 8954, Rev. C. 1907; re-en. Sec. 11650, R. C. M. 1921.

94-5115. (11651) Appeal by complainant. A complainant against whom costs are adjudged may appeal from such decision to the district court in the county in which such proceedings were had, upon filing an undertaking as provided for in civil actions.

History: En. Sec. 1444, Pen. C. 1895; re-en. Sec. 8955, Rev. C. 1907; re-en. Sec. 11651, R. C. M. 1921.

Collateral References
Breach of the Peace 521.
11 C.J.S. Breach of the Peace 29.

94-5116. (11652) Security for the peace. Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this chapter.

History: En. Sec. 1445, Pen. C. 1895; re-en. Sec. 8956, Rev. C. 1907; re-en. Sec. 11652, R. C. M. 1921. Cal. Pen. C. Sec. 714. Collateral References

Breach of the Peace 16.

11 C.J.S. Breach of the Peace 20.

CHAPTER 52

POLICE IN CITIES AND TOWNS AND THEIR ADMITTANCE AT PUBLIC MEETINGS

Section 94-5201. Organization and regulation of the police. 94-5202. Force to preserve the peace at public meetings.

94-5201. (11653) Organization and regulation of the police. The organization and regulation of the police, in the cities and towns of this state, is governed by special laws and ordinances.

History: En. Sec. 1450, Pen. C. 1895; re-en. Sec. 8957, Rev. C. 1907; re-en. Sec. 11653, R. C. M. 1921. Cal. Pen. C. Sec. 719.

Collateral References Municipal Corporations № 180 (1). 62 C.J.S. Municipal Corporations § 563

94-5202. (11654) Force to preserve the peace at public meetings. The mayor or other officer having the direction of the police of a city or town must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

History: Ap. p. Sec. 18, p. 192, Cod. Stat. 1871; re-en. Sec. 18, 3d Div. Rev. Stat. 1879; re-en. Sec. 18, 3d Div. Comp. Stat. 1887; amd. Sec. 1451, Pen. C. 1895; re-en. Sec. 8958, Rev. C. 1907; re-en. Sec. 11654, R. C. M. 1921. Cal. Pen. C. Sec. 720.

Collateral References

Municipal Corporations = 189 (1). 62 C.J.S. Municipal Corporations §§ 574,

CHAPTER 53

SUPPRESSION OF RIOTS

Section 94-5301. Power of the sheriff in overcoming resistance.

94-5302. Officer to certify to court the name of resisters, etc. 94-5303. Governor to order out militia to aid in executing process.

94-5304. Magistrates and officers to command rioters to disperse. 94-5305. To arrest rioters if they do not disperse. 94-5306. Officers who may order out the militia. 94-5307. Commanding officer and troops to obey the order.

94-5308. Armed force to obey orders of whom.
94-5309. Sheriff to have charge of national guard.
94-5310. Conduct of troops.
94-5311. Conduct of troops.

94-5312. Governor may declare a county in a state of insurrection.

94-5313. Governor may revoke the proclamation.

94-5314. Liability of officers for neglect of duties concerning unlawful or riotous assembly.

94-5301. (11655) Power of the sheriff in overcoming resistance. When a sheriff or other public officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors.

History: En. Sec. 19, p. 192, Cod. Stat. 1871; re-en. Sec. 19, 3d Div. Rev. Stat. 1879; re-en. Sec. 19, 3d Div. Comp. Stat. 1887; amd. Sec. 1460, Pen. C. 1895; re-en. Sec. 8959, Rev. C. 1907; re-en. Sec. 11655, R. C. M. 1921. Cal. Pen. C. Sec. 723.

Collateral References

Riot =9.

77 C.J.S. Riot § 30. 47 Am. Jur. 839 et seq., Sheriffs, Police and Constables, § 26 et seq.

94-5302. (11656) Officer to certify to court the name of resisters, etc. The officer must certify to the court from which the process issued, the names of the persons resisting, and their aiders and abettors, to the end that they may be proceeded against for their contempt of court.

History: Ap. p. Sec. 19, p. 192, Cod. Stat. 1871; re-en. Sec. 19, 3d Div. Rev. Stat. 1879; re-en. Sec. 19, 3d Div. Comp.

Stat. 1887; amd. Sec. 1461, Pen. C. 1895; re-en. Sec. 8960, Rev. C. 1907; re-en. Sec. 11656, R. C. M. 1921, Cal. Pen. C. Sec. 724.

94-5303. (11657) Governor to order out militia to aid in executing process. If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, or to quell any unlawful or riotous assembly, he must, upon the application of the sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the organized national guard or enrolled militia of the state, to proceed to the assistance of the sheriff.

History: En. Sec. 1462, Pen. C. 1895; re-en. Sec. 8961, Rev. C. 1907; re-en. Sec. 11657, R. C. M. 1921.

Collateral References
Militia 15; Riot 29.
57 C.J.S. Militia § 21; 77 C.J.S. Riot 32.
36 Am. Jur. 214, Military, § 45.

94-5304. (11658) Magistrates and officers to command rioters to disperse. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the state immediately to disperse.

History: En. Sec. 16, p. 192, Cod. Stat. 1871; re-en. Sec. 16, 3d Div. Rev. Stat. 1879; relen. Sec. 16, 3d Div. Comp. Stat. 1887; amd. Sec. 1463, Pen. C. 1895; re-en. Sec. 8962, Rev. C. 1907; re-en. Sec. 11658, R. C. M. 1921. Cal. Pen. C. Sec. 726.

Liability of Sheriff

This section is merely declaratory of the common law and the sheriff is not liable in damages for damage caused by mob violence. Annala v. McLeod, 122 M 498, 206 P 2d 811, 815.

94-5305. (11659) To arrest rioters if they do not disperse. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

History: En. Sec. 1464, Pen. C. 1895; re-en. Sec. 8963, Rev. C. 1907; re-en. Sec. 11659, R. C. M. 1921. Cal. Pen. C. Sec. 727.

Liability of Sheriff

This section is merely declaratory of the common law and the sheriff is not liable in damages for damage caused by mob violence. Annala v. McLeod, 122 M 498, 206 P 2d 811, 815.

94-5306. (11660) Officers who may order out the milita. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state or of the United States, and the fact is made known to the governor by any justice of the supreme court, or judge of the district court, or sheriff of the county, or the mayor or marshal of a city, the governor may issue an order directed to the commanding officer of a division or brigade of the organized national guard, or enrolled militia of the state, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified, to aid the civil authorities in suppressing violence and enforcing the laws.

History: En. Sec. 1465, Pen. C. 1895; 11660, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8964, Rev. C. 1907; re-en. Sec. 728.

94-5307. (11661) Commanding officer and troops to obey the order. The organized national guard or enrolled militia, or such portion thereof as shall be called into active service, as provided in the preceding section, must appear at the time and place appointed, fully armed and equipped.

History: En. Sec. 1466, Pen. C. 1895; re-en. Sec. 8965, Rev. C. 1907; re-en. Sec. 11661, R. C. M. 1921.

94-5308. (11662) Armed force to obey orders of whom. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, as provided in the following section, it must obey the orders in relation thereto of such civil officer.

History: En. Sec. 1467, Pen. C. 1895; re-en. Sec. 8966, Rev. C. 1907; re-en. Sec. 11662, R. C. M. 1921.

94-5309. (11663) Sheriff to have charge of national guard. Whenever any portion of the national guard or enrolled militia is called into active service to suppress an insurrection or rebellion, to disperse a mob, or to enforce the execution of the laws of this state, or of the United States, it is competent for the commander-in-chief, or for the general acting in his stead, to place such troops under the temporary direction of the sheriff of any county.

History: En. Sec. 1468, Pen. C. 1895; re-en. Sec. 8967, Rev. C. 1907; re-en. Sec. 11663, R. C. M. 1921.

94-5310. (11664) Conduct of troops. When the commander-in-chief, or general acting in his stead, shall call troops into active service, and shall not place them under the temporary direction of any civil officer, the commanding officer shall use his own discretion with respect to the propriety of attacking or firing upon, any mob or unlawful assembly, but no officer who has been called out to sustain the civil authorities shall, under any pretense, or in compliance with any order, fire blank cartridges upon any mob or unlawful assemblage, under penalty of being cashiered by sentence of a court-martial; provided, that nothing in this chapter shall be construed as prohibiting any such troops from firing or charging upon such mob or assembly, without the order of such civil officer, in case they shall first be attacked or fired upon, or forcibly resisted in discharge of their duties.

History: En. Sec. 1469, Pen. C. 1895; re-en. Sec. 8968, Rev. C. 1907; re-en. Sec. 11664, R. C. M. 1921.

94-5311. (11665) Conduct of troops. Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives are endangered.

History: En. Sec. 1470, Pen. C. 1895; re-en. Sec. 8969, Rev. C. 1907; re-en. Sec. 11665, R. C. M. 1921.

94-5312. (11666) Governor may declare a county in a state of insurrection. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the county attorney, or judge of the district court of the county, by proclamation, published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of the organized national guard, or volunteer uniformed companies, or other militia of the state, as he deems necessary, to serve for such term and under the command of such officer as he may direct.

History: En. Sec. 1471, Pen. C. 1895; re-en. Sec. 8970, Rev. C. 1907; re-en. Sec. 11666, R. C. M. 1921.

Collateral References

Insurrection and Sedition € 5. 46 C.J.S. Insurrection and Sedition § 4. 45 Am. Jur. 2d 1, 3, Insurrection, § § 1, 3.

94-5313. (11667) Governor may revoke the proclamation. The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him.

History: En. Sec. 1472, Pen. C. 1895; re-en. Sec. 8971, Rev. C. 1907; re-en. Sec. 11667, R. C. M. 1921.

94-5314. Liability of officers for neglect of duties concerning unlawful or riotous assembly. If the sheriff of a county, the chief of police and/or mayor of a town or city, or the constables of a township, or any of them, having notice of an unlawful or riotous assembly, neglect to proceed to the place of assembly and to exercise the authority with which they are vested for dispersing the same and arresting the offenders, they shall be liable for all damages sustained.

History: En. Sec. 1, Ch. 204, L. 1947.

Liability of Sheriff

There was no provision imposing liability for damages upon the sheriff prior to the enactment of this law. Annala v. McLeod, 122 M 498, 206 P 2d 811, 815.

CHAPTER 54

IMPEACHMENT

Section 94-5401. Officers liable to impeachment. Sole power of impeachment. 94-5402. 94-5403. Articles, how prepared-trial by senate. Articles of impeachment. 94-5404. Time of hearing-service of defendant. 94-5405. 94-5406. Service, how made. 94-5407. Proceedings on failure to appear. 94-5408. Counsel may be appointed. 94-5409. Defendant, after appearance, may answer or demur. 94-5410. If demurrer is overruled, defendant must answer. 94-5411. Senate to be sworn. Two-thirds necessary to a conviction. 94-5412. 94-5413. Judgment on conviction, how pronounced.

94-5414. Judgment on conviction, how pronounced.

94-5415 Nature of the judgment.

94-5416. Effect of judgment of suspension.

94-5417. Impeachment disqualifies until acquittal-vacancy, how filled.

94-5418. Presiding officer when lieutenant-governor is impeached

94-5419. Impeachment not a bar to indictment.

94-5401. (11668) Officers liable to impeachment. The governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office.

History: Our present impeachment laws are substantially the same as the territorial acts which provided for trial by the council. See Secs. 41-62, pp. 196-199, Cod. Stat. 1871; re-en. as Secs. 41-62, 3rd Div. Rev. Stat. 1879; re-en. as Secs. 41-63, 3rd Div. Comp. Stat. 1887; en. Sec. 1500, Pen. C. 1895; re-en. Sec. 8972, Rev. C. 1907; re-en. Sec. 11668, R. C. M. 1921. Cal. Pen. C. Sec. 737.

Construction

This section having the same language as section 17, article V of the constitution, is given the same construction, and does not include senators within the terms "judicial officers" or "state officers." State ex rel. Haviland v. Beadle, 42 M 174, 180, 111 P 720.

Collateral References

Officers 3. 67 C.J.S. Officers 68. 43 Am. Jur. 27, Public Officers, §§ 175-180.

94-5402. (11669) Sole power of impeachment. The sole power of impeachment vests in the house of representatives; the concurrence of a majority of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

History: En. Sec. 1501, Pen. C. 1895; re-en. Sec. 8973, Rev. C. 1907; re-en. Sec. 11669, R. C. M. 1921.

94-5403. (11670) Articles, how prepared—trial by senate. All impeachments must be by resolution adopted, originated in, and conducted by managers elected by the house of representatives, who must prepare articles of impeachment, present them at the bar of the senate, and prosecute the same.

History: En. Sec. 1502, Pen. C. 1895; re-en. Sec. 8974, Rev. C. 1907; re-en. Sec. 11670, R. C. M. 1921. Cal. Pen. C. Sec. 738.

94-5404. (11671) Articles of impeachment. When an officer is impeached by the house of representatives, the articles of impeachment must be delivered to the president of the senate.

History: En. Sec. 1503, Pen. C. 1895; re-en. Sec. 8975, Rev. C. 1907; re-en. Sec. 11671, R. C. M. 1921. Cal. Pen. C. Sec. 739.

94-5405. (11672) Time of hearing—service of defendant. The senate must assign a day for the hearing of the impeachment, and inform the house of representatives thereof. The president of the senate must cause a copy

of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than ten days before the day fixed for the hearing.

History: En. Sec. 1504, Pen. C. 1895; re-en. Sec. 8976, Rev. C. 1907; re-en. Sec. 11672, R. C. M. 1921. Cal. Pen. C. Sec. 740.

94-5406. (11673) Service, how made. The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the state, the senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place and answer the articles of impeachment.

History: En. Sec. 1505, Pen. C. 1895; re-en. Sec. 8977, Rev. C. 1907; re-en. Sec. 11673, R. C. M. 1921. Cal. Pen. C. Sec. 741.

94-5407. (11674) Proceedings on failure to appear. If the defendant does not appear, the senate, upon proof of service or publication, as provided in the last two sections, may, of its own motion or for cause shown, assign another day for hearing the impeachment, or may proceed, in the absence of the defendant, to trial and judgment.

History: En. Sec. 1506, Pen. C. 1895; re-en. Sec. 8978, Rev. C. 1907; re-en. Sec. 11674 R. C. M. 1921. Cal. Pen. C. Sec. 742.

94-5408. (11675) Counsel may be appointed. If the defendant appear, and is unable to procure the assistance of counsel, it is the duty of the president of the senate to appoint some suitable person to assist him in his defense; if the defendant is served by publication and fails to appear, it is the duty of the president of the senate to appoint some person or counsel to appear in his behalf and make defense for him.

History: En. Sec. 1507, Pen. C. 1895; re-en. Sec. 8979, Rev. C. 1907; re-en. Sec. 11675, R. C. M. 1921.

94-5409. (11676) Defendant, after appearance, may answer or demur. When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment.

History: En. Sec. 1508, Pen. C. 1895; re-en. Sec. 8980, Rev. C. 1907; re-en. Sec. 11676, R. C. M. 1921. Cal. Pen. C. Sec. 743.

94-5410. (11677) If demurrer is overruled, defendant must answer. If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, the senate must render judgment of conviction against him. If he plead not guilty or refuses to plead, the senate must, at such time as it may appoint, proceed to try the impeachment.

History: En. Sec. 1509, Pen. C. 1895; re-en. Sec. 8981, Rev. C. 1907; re-en. Sec. 11677, R. C. M. 1921, Cal. Pen. C. Sec. 744. 94-5411. (11678) Senate to be sworn. At the time and place appointed, and before the senate proceeds to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath.

History: En. Sec. 1510, Pen. C. 1895; re-en. Sec. 8982, Rev. C. 1907; re-en. Sec. 11678, R. C. M. 1921. Cal. Pen. C. Sec. 745.

94-5412. (11679) Two-thirds necessary to a conviction. The defendant cannot be convicted on impeachment without the concurrence of two-thirds of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction, he must be acquitted.

History: En Sec. 1511, Pen. C. 1895; re-en. Sec. 8983, Rev. C. 1907; re-en. Sec. 11679, R. C. M. 1921. Cal. Pen. C. Sec. 746.

94-5413. (11680) Judgment on conviction, how pronounced. After conviction, the senate must, at such time as it may appoint, pronounce judgment, in the form of a resolution entered upon the journals of the senate.

History: En Sec. 1512, Pen. C. 1895; re-en. Sec. 8984, Rev. C. 1907; re-en. Sec. 11680, R. C. M. 1921. Cal. Pen. C. Sec. 747.

94-5414. (11681) Judgment on conviction, how pronounced. On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate.

History: En Sec. 1513, Pen. C. 1895; re-en. Sec. 8985, Rev. C. 1907; re-en. Sec. 11681, R. C. M. 1921. Cal. Pen. C. Sec. 748.

94-5415. (11682) Nature of the judgment. The judgment may be that the defendant be suspended, or that he be removed from office and disqualified to hold any office of honor, trust, or profit under the state.

History: En Sec. 1514, Pen. C. 1895; re-en. Sec. 8986, Rev. C. 1907; re-en. Sec. 11682, R. C. M. 1921. Cal. Pen. C. Sec. 749.

94-5416. (11683) Effect of judgment of suspension. If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

History: En Sec. 1515, Pen. C. 1895; re-en. Sec. 8987, Rev. C. 1907; re-en. Sec. 11683, R. C. M. 1921. Cal. Pen. C. Sec. 750.

94-5417. (11684) Impeachment disqualifies until acquittal — vacancy, how filled. Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any officer, other than the governor, his

office must be at once temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled at the next election as required by law.

History: En Sec. 1516, Pen. C. 1895; re-en. Sec. 8988, Rev. C. 1907; re-en. Sec. 11684, R. C. M. 1921. Cal. Pen. C. Sec. 751.

Collateral References Officers 58 67 C.J.S. Officers § 49 et seq. 43 Am. Jur. 29, Public Officers, § 180.

94-5418. (11685) Presiding officer when lieutenant-governor is impeached. If the lieutenant-governor is impeached, notice of the impeachment must be immediately given to the senate by the house of representatives, that another president may be chosen.

History: En. Sec. 1517, Pen. C. 1895; re-en. Sec. 8989, Rev. C. 1907; re-en. Sec. 11685, R. C. M. 1921. Cal. Pen C. Sec. 752.

Collateral References States 52 81 C.J.S. States § 49.

94-5419. (11686) Impeachment not a bar to indictment. If the offense for which the defendant is convicted on impeachment is also the subject of an indictment or information, the indictment or information is not barred thereby.

History: En. Sec. 1518, Pen. C. 1895; re-en. Sec. 8990, Rev. C. 1907; re-en. Sec. 11686, R. C. M. 1921. Cal. Pen. C. Sec. 753

Collateral References Criminal Law == 163. 22 C.J.S. Criminal Law § 240.

CHAPTER 55

REMOVAL OF OFFICERS OTHERWISE THAN BY IMPEACHMENT

Section 94-5501.

Officers subject to removal.
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94-5501. (11687) Officers subject to removal. All officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, as provided in this chapter.

History: En. Sec. 1530, Pen. C. 1895; re-en. Sec. 8991, Rev. C. 1907; re-en. Sec. 11687, R. C. M. 1921.

Employment Security Commission

These sections do not restrain or limit the governor's power of removal of the third member on the unemployment compensation (now employment security) commission. State ex rel. Bonner v. District Court, 122 M 464, 206 P 2d 166, 171.

Removal of Clerk of School District

A clerk of a school district board of trustees may be removed without notice and hearing since he is not a public officer. State ex rel. Running v. Jacobson, 140 M 221, 370 P 2d 483, 486.

Collateral References
Officers©=66.
67 C.J.S. Officers § 59 et seq.

See generally, 43 Am. Jur. 30 et seq., Public Officers, § 181 et seq.

94-5502. (11688) Accusation, by whom presented. An accusation in writing against any district, county, township, or municipal officer or school trustee, for willful or corrupt misconduct or malfeasance in office, may be presented by the grand jury, or filed by the county attorney, of the county for which the officer accused is elected or appointed, or an accusation may be filed by the attorney general.

History: En. Sec. 1531, Pen. C. 1895; re-en. Sec. 8992, Rev. C. 1907; re-en. Sec. 11688, R. C. M. 1921; amd. Sec. 1, Ch. 216, L. 1939. Cal. Pen. C. Sec. 758.

Distinction between Nonfeasance and Malfeasance

Held, under the rule that one may not be charged with a specific offense and convicted of another distinct and non-included offense, that an officer may not be charged with nonfeasance under section 94-5516, and convicted on proof of malfeasance, the prosecution charging which must be instituted in pursuance of this section. State v. Beazley, 77 M 430, 440, 250 P 1114.

How Jurisdiction Invoked

Where removal of a district, township or county officer is sought for willful or corrupt misconduct or malfeasance in office—acts of commission—the jurisdiction of the district court, can, under this section, be invoked only by an accusation presented by the grand jury; where, however, the charge is willful refusal or neglect to perform official duties, constituting nonaction, jurisdiction may be invoked by the filing of a verified petition by any person, under section 94-5516, whereupon the court may try the accused summarily without the aid of a jury. State ex rel. Hessler v. District Court, 64 M 296, 297,

209 P 1052; State ex rel. Beazley v. District Court, 75 M 116, 118, 241 P 1075.

Public officers who are not subject to impeachment may be removed for misconduct or malfeasance only by proceedings had under an indictment of a grand jury, and for nonfeasance or for the collection of illegal fees under an accusation in writing. State ex rel. King v. Smith, 98 M 171, 174, 38 P 2d 274.

Operation and Effect

This section was intended to apply to those cases only in which the accused has been guilty of willful or corrupt misconduct or malfeasance. State ex rel. Rowe v. District Court, 44 M 318, 323, 119 P 1103.

Removal of Attorney General

The power granted to the district court by section 94-5515 in a proceeding looking to the removal of the county attorney, to appoint the county attorney of an adjoining county to act as prosecuting officer, may only be exercised when charges are preferred by a grand jury under this section. State ex rel. McGrade v. District Court, 52 M 371, 374, 157 P 1157.

Collateral References

Officers \$\infty 74\$ and specific topics.
67 C.J.S. Officers § 61.
43 Am. Jur. 62, Public Officers, §§ 235-

94.5503. (11689) Form of accusation. The accusation must state the offense charged, in ordinary and concise language, and without repetition.

History: En. Sec. 1532, Pen. C. 1895; re-en. Sec. 8993, Rev. C. 1907; re-en. Sec. 11689, R. C. M. 1921. Cal. Pen. C. Sec. 759.

94-5504. (11690) To be transmitted to the county attorney and copy served. The accusation must be delivered by the foreman of the grand jury to the county attorney of the county, except when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by notice in writing of not less than ten days, that he appear before the district court of the county, at a time mentioned in the notice, and answer the accusation. The original accusation must then be filed with the clerk of the court.

History: En. Sec. 1533, Pen. C. 1895; re-en. Sec. 8994, Rev. C. 1907; re-en. Sec. 11690, R. C. M. 1921. Cal. Pen. C. Sec. 760.

94-5505. (11691) Proceedings if defendant does not appear. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

History: En. Sec. 1534, Pen. C. 1895; re-en. Sec. 8995, Rev. C. 1907; re-en. Sec. 11691, R. C. M. 1921. Cal. Pen. C. Sec. 761.

94-5506. (11692) Defendant may object to or deny the accusation. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

History: En. Sec. 1535, Pen. C. 1895; re-en. Sec. 8996, Rev. C. 1907; re-en. Sec. 11692, R. C. M. 1921. Cal. Pen. C. Sec. 762.

94-5507. (11693) Form of objection. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection.

History: En. Sec. 1536, Pen. C. 1895; re-en. Sec. 8997, Rev. C. 1907; re-en. Sec. 11693, R. C. M. 1921. Cal. Pen. C. Sec. 763.

94-5508. (11694) Manner of denial. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

History: En. Sec. 1537, Pen. C. 1895; re-en. Sec. 8998, Rev. C. 1907; re-en. Sec. 11694, R. C. M. 1921, Cal. Pen. C. Sec. 764.

94-5509. (11695) If objections overruled, defendant must answer. If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

History: En. Sec. 1538, Pen. C. 1895; re-en. Sec. 8999, Rev. C. 1907; re-en. Sec. 11695, R. C. M. 1921. Cal. Pen. C. Sec. 765.

94-5510. (11696) Proceedings on plea of guilty, refusal to answer, etc. If the defendant pleads guilty, the court must render judgment of conviction against him. If he denies the matters charged or refuses to answer the accusation, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

History: En. Sec. 1539, Pen. C. 1895; re-en. Sec. 9000, Rev. C. 1907; re-en. Sec. 11696, R. C. M. 1921. Cal. Pen. C. Sec. 766.

94-5511. (11697) Trial by jury. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

History: En. Sec. 1540, Pen. C. 1985; re-en. Sec. 9001, Rev. C. 1907; re-en. Sec. 11697, R. C. M. 1921, Cal. Pen. C. Sec. 767. Collateral References
Jury 19 (12); Officers 74.
50 C.J.S. Juries § 51; 67 C.J.S. Officers § 67.

94-5512. (11698) State and defendant entitled to process for witnesses. The county attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses, as upon a trial of an indictment.

History: En. Sec. 1541, Pen. C. 1895; re-en. Sec. 9002, Rev. C. 1907; re-en. Sec. 11698, R. C. M. 1921. Cal. Pen. C. Sec. 768.

Collateral References
Witnesses © 2 (1).
97 C.J.S. Witnesses § 6 et seq.

94-5513. (11699) Judgment upon conviction and its form. Upon a conviction, the court must, at such time as it may appoint, pronounce judgment that defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein.

History: En. Sec. 1542, Pen. C. 1895; re-en. Sec. 9003, Rev. C. 1907; re-en. Sec. 11699, R. C. M. 1921, Cal. Pen. C. Sec. 769.

94-5514. (11700) Appeal—how taken—defendant to be suspended and vacancy filled. In any proceeding instituted under the provisions of sections 94-5501 to 94-5516, both inclusive, an appeal may be taken to the supreme court by the plaintiff from a judgment in favor of the defendant, and by the defendant from a judgment removing him from his office, which appeal shall be taken in the same manner as from a judgment in a civil action; but if the appeal be from a judgment of removal, the defendant is suspended from his office pending such appeal, during which time the office must be filled as in case of a vacancy.

History: En. Sec. 1543, Pen. C. 1895; 11700, R. C. M. 1921; amd. Sec. 1, Ch. 141, re-en. Sec. 9004, Rev. C. 1907; re-en. Sec. L. 1931, Cal. Pen. C. Sec. 770.

94-5515. (11701) Proceedings for the removal of a county attorney. The same proceedings may be had on like grounds for the removal of a county attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the district court of the county, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the county attorney of an adjoining county, and require him to conduct the proceedings.

History: En. Sec. 1544, Pen. C. 1895; re-en. Sec. 9005, Rev. C. 1907; re-en. Sec. 11701, R. C. M. 1921. Cal. Pen. C. Sec. 771.

Appointment of Prosecutor

The power to appoint a prosecuting officer under this section applies only to proceedings instituted by the grand jury under section 94-5502, it does not confer upon the court the power to impose any duty upon a county attorney of another county as such, except in the particular emergency named, nor does it authorize the calling in of a county attorney from any other than an adjoining county. State ex rel. McGrade v. District Court, 52 M 371, 374, 157 P 1157.

Compensation of Appointed Prosecutor

A county attorney called into an adjoining county by appointment under this section, to act as prosecuting officer in a proceeding for the removal of a county attorney upon an accusation by a taxpayer charging neglect of duty, is not entitled to compensation for services thus rendered. State ex rel. McGrade v. District Court, 52 M 371, 374, 157 P 1157.

Collateral References

District and Prosecuting Attorneys 2 (5).

27 C.J.S. District and Prosecuting Attorneys §§ 6, 7, 9.
42 Am. Jur. 239, Prosecuting Attorneys,

§ 8.

94-5516. (11702) Removal of public officers by summary proceedings. When an accusation in writing, verified by the oath of any person, is presented to the district court, alleging that any officer within the jurisdiction of the court has been guilty of knowingly, willfully, and corruptly charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has willfully refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than forty days from the date on which the accusation was presented, must proceed to hearing, in a summary manner, or trial, upon the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; provided, if the charge be for the charging and collecting of illegal fees or salaries, the trial must be by jury, if the defendant so demands, and conducted in all respects and in the same manner as the trial of an indictment for a misdemeanor, and the defendant shall be entitled, as a matter of defense, to offer evidence of, and the jury under proper instructions shall consider, his good faith or honest mistake, if any be shown, and the value received by the state, county, township, or municipality against whom the charges or fees were made. If, upon such hearing or trial, the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases; and if the charge is not sustained, the court may enter a judgment against the complaining witness for costs as are allowed in civil cases.

History: En. Sec. 1545, Pen. C. 1895; re-en. Sec. 9006, Rev. C. 1907; amd. Sec. 1, Ch. 25, L. 1917; re-en. Sec. 11702, R. C. M. 1921. Cal. Pen. C. Sec. 772.

Constitutionality

This section is not rendered unconstitutional by fact that the prosecution is not by information or indictment. The proceedings therein prescribed do not necessarily partake of the nature of a criminal prosecution, and the legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those who may be removed by impeachment. State ex rel. Payne v. District Court, 53 M 350, 356, 165 P 294.

Applicable to Hearing Before Governor

This statute providing that the defendant shall be entitled, in defense, to offer evidence of his good faith, such declaration evidences the public policy of the state and must be held applicable to proceeding instituted by the governor for the removal of members of the state highway commission at a hearing before him, and denial of the right is error. State ex rel. Holt v. District Court, 103 M 438, 444, 63 P 2d 1026.

Costs

In an action for the removal of county

officers brought by the attorney general in the name and on behalf of the state, the county, and not the attorney general personally, is liable for the payment of witness fees. Griggs v. Glass, 58 M 476, 479, 193 P 564.

Disqualification of Governor—Control of Discretion

In the absence of a statute providing for the disqualification of the governor on account of prejudice from hearing charges for removal of members of a state commission, existence of such prejudice does not disqualify the governor; the proceeding is not judicial in character; and under the theory of independence of departments, the judiciary may compel governor to hear such proceeding, but it may not control executive discretion. State ex rel. Holt v. District Court, 103 M 438, 447, 448, 63 P 2d 1026.

Disqualification of Judge, When Not Permitted

Proceedings for the removal of civil officers under this section are criminal in their nature, and therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under section 93-901. (Mr. Justice Holloway dissenting.) State ex rel. Houston v. District Court, 61 M 558, 559, 202 P 756.

Evidence Admissible as a Defense

Where among other defenses to an accusation against a county commissioner charging the collection of illegal fees for supervising road and kindred work, defendant set up the plea of value received by the county, the court erred in restricting testimony offered for the purpose of showing that the county had been saved large sums in the construction of roads by reason of his services, to a showing what like services were reasonably worth, the offered evidence having been made admissible by the express terms of this section, in such a proceeding. State v. Russell, 84 M 61, 65, 274 P 148.

Fees Illegally Collected—Effect

The district court may remove a police judge from office for illegally collecting a fee from a defendant for approving a bond filed in support of an appeal from a judgment of conviction for a violation of a city ordinance. State ex rel. Rowe v. District Court, 45 M 205, 209, 122 P 270.

"Illegal Fees" Defined

The term "fees," used in the codes, is somewhat elastic, and as employed in this section is broad enough to comprehend both per diem and expenses. State ex rel. Payne v. District Court, 53 M 350, 353, 165 P 294; State v. Story, 53 M 573, 575, 576, 165 P 748.

Fees are illegal within the meaning of this section if collected for services never rendered, or never intended to be rendered; if collected for services rendered for which no compensation is allowed by law; or if collected for services at a rate higher than the law allows therefor. State ex rel. Payne v District Court, 53 M 350, 354, 165 P 294

A county commissioner is not entitled to a fee for attending to business of the county, other than meeting with the board of commissioners, and for "inspecting and overseeing road-work," where he is not acting pursuant to any previous direction of the board; hence, if he makes a charge against the county for such services, as county commissioner, and collects the money therefor, he is guilty of charging and collecting illegal fees by virtue of his official position, and he may be removed from office under this section State v. Story, 53 M 573, 165 P 748; State v. Callaghan, 53 M 584, 165 P 753; State v. Overstreet, 53 M 585, 165 P 753.

"Illegal fees" are any moneys collected or attempted to be collected by such officer from any source whatever, whether as mileage, per diem, or specific charge for service rendered in his office, without authority of law for such collection, though done in good faith and for efficient service performed for the public. State v. Story, 53 M 573, 576, 165 P 748.

Illegal Fees for Services Rendered in Office—What Does Not Constitute

In no way can it be ascertained whether an officer has collected illegal fees within the meaning of this section without a reference to the various code sections in the chapter on "Salaries and Fees of Officers" (25-102 et seq. and 25-501 et seq.). State v. Story, 53 M 573, 578, 165 P 748.

Under this section, a county officer may summarily be removed for corruptly collecting "illegal fees for services rendered in his office." Held, that under this section a county commissioner may not be removed unless it be alleged and proved that he collected illegal fees for services rendered in his office while acting in his official capacity, and that an accusation charging the collection of his expenses and per diem during his attendance at a state meeting of county commissioners, though under chapter 48, Laws of 1927 (25-508), another member of the board had been designated to attend such meeting, was properly demurrable, the fees alleged to have been illegally received not having been received by defendant for services rendered in his office. State ex rel. King v. Smith, 98 M 171, 174, 38 P 2d 274.

Intent

The amendment of this section, by making a criminal intent the gist of the offense, deprived the district court of jurisdiction of a prosecution instituted prior thereto, since no saving clause is provided by the constitution or statute. State ex rel. Paige v. District Court, 54 M 332, 169 P 1180.

Jury Trial Not Authorized

The proceeding authorized by this section is quasi-criminal in character, but the accused is not entitled to a jury trial. State ex rel. Rowe v. District Court, 44 M 318, 327, 119 P 1103; State ex rel. Payne v. District Court, 53 M 350, 356, 165 P 294. See also State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

Held, that an officer (county clerk), charged with willful neglect of duty is not entitled to a trial by jury in a proceeding for his removal from office. State ex rel. Bullock v. District Court, 62 M 600, 602, 205 P 955.

Where removal of a county, district or township officer is sought for willful or corrupt misconduct or malfeasance in office—acts of commission—the jurisdiction of the district court can, under section 94-5502, be invoked only by an accusa-

tion presented by the grand jury; where, however, the charge is willful refusal or neglect to perform official duties, constituting nonaction, jurisdiction may be invoked by the filing of a verified petition by any person, under this section, whereupon the court may try the accused summarily without the aid of a jury. State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052.

Where willful or corrupt malfeasance in office is charged, ouster proceedings must be had under the provisions of section 94-5502, and the accused officer is entitled to a jury trial; where the charge is non-feasance only, the proceeding is, under this section, triable summarily by the court without the intervention of a jury. State ex rel. Beazley v. District Court, 75 M 116, 117, 241 P 1075.

Nature of Action

The proceeding under this section, though it may be instituted by a private person, is a public proceeding, and, except that it is summary in its nature, is to be classed as a prosecution for crime. State ex rel. Rowe v. District Court, 44 M 318, 324, 119 P 1103; State v. Driscoll, 49 M 558, 560, 144 P 153; State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

A proceeding brought for the removal of a public officer under this section is not a criminal action in the sense that it must be brought in the name of the state, that the public prosecutor must conduct it, or a jury be called to try the accused. State ex rel. Payne v. District Court, 53 M 350, 356, 357, 165 P 294; State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157, distinguished.

A proceeding to remove a public officer (county commissioner) for collecting illegal fees is not a quasi-criminal one, hence the rules of pleading governing in a criminal action are not applicable; on the contrary, a wide liberality in the matter of pleading in such a proceeding is allowable. State ex rel. King v. District Court, 95 M 400, 404, 26 P 2d 966.

A proceeding to oust a board of county commissioners for neglect of duty, joined with accusations against each member thereof charging corrupt collection of illegal fees and salary was dismissed without prejudice on motion of counsel for the plaintiff because of illness of principal counsel. Within a few months thereafter another taxpayer filed accusations identical with those theretofore dismissed, adding two new charges against the officers individually alleging collection of illegal fees. On the theory that the several accusations charged misdemeanors and were criminal in nature, the accused interposed pleas in bar to the renewed accusations.

The pleas were sustained. Held, on application for writ of supervisory control, that such proceedings are neither criminal nor quasi-criminal; that all steps (other than those on the trial) are governed by the rules of practice in civil cases, and that therefore the pleas in bar were improperly sustained. State ex rel. Odenwald v. District Court, 98 M 1, 7, 38 P 2d 269; State ex rel. King v. Smith, 98 M 171, 38 P 2d 274.

Operation and Effect

Under this section, it is the public policy of the state, in cases where a county officer is charged with collecting illegal fees, that such officer be entitled, as a matter of defense, to offer evidence of his good faith or honest mistake and the value received by the county. State v. Hale, 126 M 326, 249 P 2d 495, 496.

Operation in General

One of the methods provided by law for the removal of an officer from office is a summary proceeding, as prescribed in this section, initiated upon a written accusation verified by the oath of "any person." State v. Driscoll, 49 M 558, 561, 144 P 153.

Remedy To Review Action of Court

As this section makes no provision for an appeal or other means of review, mandamus lies to compel the district court to proceed with the trial of an accusation for the removal of a public officer under this section. State ex rel. Payne v. District Court, 53 M 350, 357, 165 P 294.

Held, that where proceedings for the removal of county commissioners which were required to be heard within forty days after presentation of the accusation, were disposed of by a judgment of dismissal sustaining pleas in bar interposed by the accused on the theory that the proceedings were of a criminal nature, and an appeal from the judgment could not be disposed of before the expiration of the above time limit, an exigency existed making the remedy by appeal inadequate and requiring summary action by the supreme court, and that, therefore, the writ of supervisory control was the proper remedy. State ex rel. Odenwald v. District Court, 98 M 1, 5, 38 P 2d 269.

See section 94-5514 as amended by Ch. 141, L. 1931, which allows an appeal from judgment.

Requisites of Accusation

To charge the existence of a riot for failure to suppress which a sheriff was sought to be removed from office, it was not necessary to employ the language of the statute defining riot; a statement of facts from which its existence was inferable being sufficient. State v. Driscoll, 49 M 558, 565, 144 P 153.

An accusation against a sheriff for neglect of duty, in failing to suppress a riot, and asking his removal from office, is not objectionable because specific crimes therein mentioned as having been committed during the riot were not described with the particularity required in an indictment or information against the perpetrators thereof, their commission having been incidental only, and in nowise affecting the duty of the sheriff in the premises. State v. Driscoll, 49 M 558, 565, 144 P 153.

An accusation for the removal of a sheriff from office because of neglect of official duty, which was entitled in the name of the state "on the accusation" of certain persons, was sufficient in form where it was apparent from the whole body of the document that a public proceeding and not a private action was thereby initiated, and it was not necessary to allege therein that the accuser was an elector of the county in which the accused held office. State v. Driscoll, 49 M 558, 565, 144 P 153.

The gist of the offense condemned by this section is the collection of illegal fees by virtue of official position. To constitute the offense it must be made to appear that the accused is the incumbent of a public office, that, acting by virtue of his office, he collected certain fees, and that the fees were illegal, that is, not authorized by law under the circumstances of the particular case. State ex rel. Payne v. District Court, 53 M 350, 353, 354, 165 P 294.

An accusation charging an officer with collecting illegal fees will be held sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language and in such manner that a person of common understanding may know what is intended. It will also be sufficient if it shows on its face that the fees collected were illegal, and a statement that they were illegal is not required. State ex rel. Payne v. District Court, 53 M 350, 354, 355, 165 P 294; State v. Story, 53 M 573, 575, 165 P 748.

One charging a district or county officer with an act of misfeasance or malfeasance in office, a matter of which the grand jury must take cognizance, cannot by pleading that after such act had been done the officer willfully refused and neglected to undo it, bring the accusation within the purview of this section, under which an officer may be tried summarily for such refusal or neglect, nor may he justify the procedure followed by the argument ab inconvenienti. State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052.

Summary Removal for Nonfeasance on Evidence Showing Malfeasance not Permissible

A sheriff was sought to be removed summarily under this section, under a charge of alleged nonfeasance in office preferred by the county attorney. The evidence introduced at the trial showed his active participation in the crime of bribery, demanding money to prevent official action on his part. Held, that his offense constituted malfeasance in office which was triable only, on accusation presented by the grand jury, with the aid of a jury, and that the trial judge was without jurisdiction to remove him on the proof submitted. State v. Beazley, 77 M 430, 437, 250 P 1114.

Time for Appearance of Party

In computing time for citing by court of party to appear the first day should be excluded and the last day included. State ex rel. Burns v. Lacklen, 129 M 243, 284 P 2d 998, 1005, overruling State ex rel. Sullivan v. District Court, 122 M 1, 196 P 2d 452, 455.

Time Limit Within Which Hearing To Be Had not Statute of Limitations

The provision of this section that a proceeding for the removal of a public officer within the jurisdiction of the court in which brought must be brought to trial within forty days after the filing of the accusation, simply means a speedy trial and is in no sense a statute of limitation against the prosecution of the charges made. State ex rel. Odenwald v. District Court, 98 M 1, 13, 38 P 2d 269.

When Court May Appoint an Attorney To Prosecute

Proceedings under this section being of a criminal nature, the district court is empowered to appoint some attorney in such a proceeding to perform the duties of the county attorney whenever the latter is absent on account of either neglect or sickness, or is disqualified for any reason. State ex rel. McGrade v. District Court, 52 M 371, 373, 374, 157 P 1157.

Where Accused Entitled to Jury Trial

Notwithstanding disagreement in interpreting this section, school trustee whose removal was sought was entitled to a jury trial and also was entitled to have the proceeding commenced within the forty days as provided herein. State ex rel. Galbreath v. District Court, 108 M 425, 427, 91 P 2d 424.

Where Court's Injunction Preventing Further Inquiry by Governor Exceeded Jurisdiction

Where governor denied members of state highway commission in removal proceed-

ings right to introduce evidence of good faith in collecting fees, and court issued writ of certiorari to review proceedings and restraining order preventing further inquiry, injunction was ordered modified so as not to prevent further hearing on same charges, or charges thereafter filed. State ex rel. Holt v. District Court, 103 M 438, 448, 63 P 2d 1026.

Collateral References

Officers 74. 67 C.J.S. Officers § 67. 43 Am. Jur. 59 et seq., Public Officers, § 225 et seq.

CHAPTER 56

LOCAL JURISDICTION OF PUBLIC OFFENSES

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-5601 to 94-5619. (11703 to 11721) Repealed.

Repeal

Sections 94-5601 to 94-5619 (Secs. 14, 16, 17, pp. 220, 221, Bannack Stat.; Sec. 31, p. 275, Cod. Stat. 1871; Secs. 1560 to 1578, Pen. C. 1895), relating to local jurisdiction of public offenses, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-304, and Title 95, ch. 4.

CHAPTER 57

TIME OF COMMENCING CRIMINAL ACTIONS

Section 94-5701. Prosecution for murder may be commenced at any time.

94-5702. Limitation of five years in all other felonies.

Limitation of one year in misdemeanors. Exception when defendant is out of the state.

94-5704.

Indictment found, when presented and filed.

94-5706. Time not counted.

94-5701. (11722) Prosecution for murder may be commenced at any time. There is no limitation of time within which a prosecution for murder or manslaughter must be commenced. It may be commenced at any time after the death of the person killed.

History: En. Sec. 20, p. 221, Bannack Stat.; re-en. Sec. 37, p. 195, Cod. Stat. 1871; re-en. Sec. 37, 3d Div. Rev. Stat. 1879; re-en. Sec. 37, 3d Div. Comp. Stat. 1887; amd. Sec. 1580, Pen. C. 1895; re-en. Sec. 9026, Rev. C. 1907; re-en. Sec. 11722, R. C. M. 1921. Cal. Pen. C. Sec. 799.

Collateral References

Criminal Law == 147. 22 C.J.S. Criminal Law § 225 (1). 21 Am. Jur. 2d 222, Criminal Law, § 154.

94-5702. (11723) Limitation of five years in all other felonies. An indictment for any other felony than murder or manslaughter must be found, or an information filed, within five years after its commission.

History: En. Sec. 22, p. 221, Bannack Stat.; re-en. Sec. 39, p. 195, Cod. Stat. 1871; re-en. Sec. 39, 3d Div. Rev. Stat. 1879; re-en. Sec. 39, 3d Div. Comp. Stat. 1887; amd. Sec. 1581, Pen. C. 1895; re-en. Sec. 9027, Rev. C. 1907; re-en. Sec. 11723, R. C. M. 1921. Cal. Pen. C. Sec. 800.

Proof as to Time of Commission

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the findings or filing of the information or indictment. State v. Rogers, 31 M 1, 4, 77 P 293.

Whether Felony or Misdemeanor

Held, that where an offense which is not divisible into degrees and does not include a lesser offense, is punishable either as a misdemeanor or as a felony in the discretion of the court or jury, it is the possible sentence which determines the grade of the crime; hence it is to be deemed a

felony up to the time of judgment, whereupon, if the punishment inflicted be other than imprisonment in the state prison, it is to be considered a misdemeanor for all purposes, under this section. State v. Atlas, 75 M 547, 550, 244 P 477.

Collateral References

Criminal Law == 147.

22 C.J.S. Criminal Law § 225 (1). 21 Am. Jur. 2d 222, Criminal Law, § 154.

Discharge of accused under limitation statute as bar to subsequent prosecution for same offense. 3 ALR 519.

Retrospective application of statute of limitations to criminal action already bar-

red. 67 ALR 306.

Limitation of time for prosecution under statute enhancing penalty for second or subsequent offense. 82 ALR 364; 116 ALR 209; 132 ALR 91 and 139 ALR 673.

Finding or return of indictment or information within period of limitation as stopping running of limitation against prosecution. 90 ALR 452.

What constitutes concealment which will prevent running of limitations against prosecution for embezzlement. 110 ALR

Construction and application of phrase "fleeing from justice," or similar phrase, in exception to statutory limitation of time for criminal prosecution after commission of offense. 124 ALR 1049.

Commencement of running of limitations against prosecution for embezzlement. 158 ALR 1158.

Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within con-templation of statute. 160 ALR 395.

(11724) Limitation of one year in misdemeanors. An indict-94-5703. ment for any misdemeanor must be found, or an information filed or complaint made, within one year after its commission.

History: En. Sec. 1582, Pen. C. 1895; re-en. Sec. 9028, Rev. C. 1907; re-en. Sec. 11724, R. C. M. 1921. Cal. Pen. C. Sec. 801.

Construction

This is a general statute of limitations, applicable to misdemeanors, and an exception to it cannot be enlarged beyond what its plain language imports, and whenever the exception is invoked the case must clearly and unequivocally fall within it. State v. Clemens, 40 M 567, 569, 107 P 896. See Smith v. Smith, 224 Fed 1, 5, 139 C C A 465.

Where Accused Departed State

Under this section the state's burden of proving that defendant, who had left the state with intention of going to Ireland, was outside the state for a period of at least twenty days was met by testimony a legitimate inference from which was that a trip to Ireland, where defendant visited a number of cities, and

return must have involved an absence from the state for at least that length of time. State v. Knilans, 69 M 8, 15, 220

Whether Felony or Misdemeanor

Defendant was charged with taking and using an automobile without the consent of the owner, under section 94-3305, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penetentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, under the rule of this case, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by this section, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. State v. Atlas, 75 M 547, 550, 244 P 477.

(11725) Exception when defendant is out of the state. If, after the offense is committed, the defendant leaves the state or resides outside the state, the indictment may be found or an information or complaint filed within the time herein limited, after his coming within the state, and no time during which the defendant is not an inhabitant of or actually a resident within this state is part of the limitation.

History: Ap. p. Sec. 23, p. 221, Bannack Stat.; re-en. Sec. 40, p. 195, Cod. Stat. 1871; re-en. Sec. 40, 3d Div. Rev. Stat. 1879; re-en. Sec. 40, 3d Div. Comp. Stat. 1887; en. Sec. 1583, Pen. C. 1895; re-en. Sec. 9029, Rev. C. 1907; amd. Sec.

1, Ch. 5, L. 1917; re-en. Sec. 11725, R. C. M. 1921. Cal. Pen. C. Sec. 802.

Operation and Effect

Under the preceding section and this section, the state's burden of proving

that defendant, who had left the state with the intention of going to Ireland, was outside the state for a period of at least twenty days was met by testimony a legitimate inference from which was that a trip to Ireland, where defendant visited a number of cities, and return must have involved an absence from the state for at least that length of

time. State v. Knilans, 69 M 8, 15, 220 P 91.

Collateral References

Criminal Law \$ 152. 22 C.J.S. Criminal Law \$ 229. 21 Am. Jur. 2d 224, Criminal Law, \$ 158.

DECISIONS UNDER FORMER LAW

Where Accused Departed State

Where a person committed a misdemeanor while within this state and afterwards departed therefrom, an information not filed until one year and ten months after the date of its commission was barred by this section. State v. Clemens, 40 M 567, 569, 107 P 896.

The mere fact that a defendant is absent from the state does not constitute any justification or excuse for delay in filing an information against him, particularly in view of the very liberal rules of this state applicable to extradition proceedings. State v. Clemens, 40 M 567, 569, 107 P 896.

94-5705. (11726) Indictment found, when presented and filed. An indictment is found within the meaning of this chapter when it is presented by the grand jury in open court, and there received and filed.

History: En. Sec. 1584, Pen. C. 1895; re-en. Sec. 9030, Rev. C. 1907; re-en. Sec. 11726, R. C. M. 1921. Cal. Pen. C. Sec. 803.

Collateral References

Criminal Law \$234. 22 C.J.S. Criminal Law \$234. 21 Am. Jur. 2d 228, Criminal Law, \$161. When does limitation commence to run against criminal prosecution for violation of income tax act. 76 ALR 1549.

When statute of limitations begins to run against criminal prosecution for conspiracy. 97 ALR 137 and 62 ALR 2d 1369.

94-5706. (11727) Time not counted. When an indictment, complaint, or information is quashed or set aside, or judgment thereon is reversed, the time during which the same was pending must not be computed as part of the time of the limitation prescribed for the offense.

History: En. Sec. 304, p. 262, Bannack Stat.; re-en. Sec. 460, p. 259, Cod. Stat. 1871; re-en. Sec. 460, 3d Div. Rev. Stat. 1879; re-en. Sec. 462, 3d Div. Comp. Stat. 1887; amd. Sec. 1585, Pen. C. 1895; re-en. Sec. 9031, Rev. C. 1907; re-en. Sec. 11727, R. C. M. 1921.

Collateral References

Criminal Law ← 160. 22 C.J.S. Criminal Law § 237. 21 Am. Jur. 2d 225, Criminal Law, § 158.

Finding or return of indictment or information within period of limitation as stopping running of limitation against prosecution. 90 ALR 452.

CHAPTER 58

THE COMPLAINT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-5801 to 94-5805. (11728 to 11732) Repealed.

Repeal

Sections 94-5801 to 94-5805 (Secs. 75 to 77, 79, pp. 202, 203, Cod. Stat. 1871; Sec. 1, p. 40, L. 1885; Secs. 1590 to 1594,

Pen. C. 1895), relating to the complaint, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-603 and 95-901.

CHAPTER 59

WARRANT OF ARREST—PROCEEDINGS ON EXECUTION THEREOF

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-5901 to 94-5918. (11733 to 11750) Repealed.

Repeal

Sections 94-5901 to 94-5918 (Sec. 78, p. 202, Cod. Stat. 1871; Secs. 1600 to 1617, Pen. C. 1895), relating to arrest warrants and proceeding upon their execution, were

repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-601, 95-603, 95-609, 95-616, 95-901, 95-902, 95-1102, and 95-1105.

CHAPTER 60

ARRESTS—BY WHOM AND HOW MADE——CLOSE PURSUIT— RETAKING AFTER ESCAPE

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6001 to 94-6033. (11751 to 11772) Repealed.

Repeal

Sections 94-6001 to 94-6033 (Secs. 111, 294, pp. 234, 261, Bannack Stat.; Secs. 63, 64, 66 to 72, 74, 450, pp. 201, 202, 258, Cod. Stat. 1871; Secs. 1630 to 1649, 1660, 1661,

Pen. C. 1895; Secs. 1 to 5, 7, Ch. 187, L. 1937; Secs. 1 to 5, Ch. 60, L. 1959), relating to arrests, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 6, sec. 95-901 and Title 95, ch. 20.

CHAPTER 61

EXAMINATION AND COMMITMENT OR DISCHARGE OF DEFENDANT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6101 to 94-6125. (11773 to 11797) Repealed.

Repeal

Sections 94-6101 to 94-6125 (Secs. 33, 40, 43 to 46, pp. 223 to 225, Bannack Stat.; Secs. 86, 90, 99 to 102, 110, 111, 114 to 116, pp. 204 to 208, Cod. Stat. 1871; Secs. 1670 to 1694, Pen. C. 1895; Sec. 1, Ch. 8, L.

1919), relating to examination of accused, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1001, 95-1102, 95-1123, 95-1202 to 95-1204, 95-1708, and 95-1801.

CHAPTER 62

PRELIMINARY PROVISIONS—FILING THE INFORMATION

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6201 to 94-6208. (11798 to 11805) Repealed.

Repeal

Sections 94-6201 to 94-6208 (Sec. 2, p. 249, L. 1891; Secs. 1720 to 1722, 1730 to 1734, Pen. C. 1895), relating to manner of prosecuting offenses and filing of in-

formations, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1302, 95-1303, 95-1502, 95-1503, and 95-1505.

CHAPTER 63

THE GRAND JURY-ITS FORMATION-POWERS AND DUTIES-

FINDING AND PRESENTING AN INDICTMENT

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-6301 to 94-6335. (11806 to 11840) Repealed.

Repeal

Sections 94-6301 to 94-6335 (Secs. 53, 54, 56, 67, 68, 71 to 73, 75, 77, 78, pp. 227, 229, 230, Bannack Stat.; Secs. 117 to 120, 123 to 129, 134, 135, 143, 145 to 152, 154, 156 to 159, pp. 209 to 214, Cod. Stat. 1871; Secs. 1750 to 1764, 1780 to 1791, 1810 to

1817, Pen. C. 1895), relating to the grand jury and the finding and presenting of an indictment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1103, 95-1104, 95-1401 to 95-1406, 95-1408 to 95-1410.

CHAPTER 64

RULES OF PLEADING AND FORM OF INFORMATION AND INDICTMENT

Section 94-6401 to 94-6407. Repealed. 94-6407.1 to 94-6413. Repealed.

Presumptions of law, etc., need not be stated. Judgments, etc., how pleaded. Private statutes, how pleaded.

94-6415.

94-6416.

94-6417.

Pleading for libel.
Pleading for forgery, where instrument has been destroyed or with-94-6418. held by defendant.

Pleading for perjury or subornation of perjury.

Pleading for larceny or embezzlement.

94-6419.

94-6420.

94-6421. Pleading for selling, exhibiting, etc., lewd and obscene books.

94-6422. Repealed.

94-6423. Distinction between accessory before the fact and principal abrogated.

Indictment against accessory.

Accessory may be indicted and tried, though principal has not been.

94-6426 to 94-6428. Repealed.

94-6429. Allegation as to partnership property. 94-6430 to 94-6434. Repealed.

(11841 to 11846) Repealed—Chapter 196, Laws of 94-6401 to 94-6406. 1967.

Repeal

Sections 94-6401 to 94-6406 (Secs. 80 to 83, p. 231, Bannack Stat.; Secs. 162 to 165, 187, pp. 216, 218, Cod. Stat. 1871; Secs. 1830 to 1835, Pen. C. 1895), relating to the rules of pleading and form of information and indictment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1410, 95-1501 to 95-1503, and 95-2001.

94-6407. (11847) Repealed—Chapter 172, Laws of 1961.

Repeal

Section 94-6407 (Sec. 188, p. 218, Cod. Stat. 1871), prohibiting the charging of more than one offense in the same indict-

ment or information, was repealed by Sec. 3, Ch. 172, Laws 1961. For new law, see secs. 95-1504, 95-1505.

94-6407.1 to 94-6413. (11848 to 11853) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-6407.1 to 94-6413 (Secs. 84, 86 to 88, p. 231, Bannack Stat.; Secs. 166, 168 to 170, 189, pp. 216, 218, Cod. Stat. 1871; Secs. 1837 to 1842, Pen. C. 1895), relating to the rules of pleading, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1503 to 95-1505 and 95-1702.

94-6414. (11854) Presumptions of law, etc., need not be stated. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment or information.

History: En. Sec. 90, p. 232, Bannack Stat.; re-en. Sec. 172, p. 217, Cod. Stat. 1871; re-en. Sec. 172, 3d Div. Rev. Stat. 1879; re-en. Sec. 172, 3d Div. Comp. Stat. 1887; amd. Sec. 1843, Pen. C. 1895; re-en. Sec. 9158, Rev. C. 1907; re-en. Sec. 11854, R. C. M. 1921. Cal. Pen. C. Sec. 961.

Cross-Reference

Charging an offense, form of charge, sec. 95-1503.

Operation and Effect

Held that the courts take judicial notice of the fact that morphine is a derivative of opium, and therefore under this section providing that matters of which judicial notice is taken need not be alleged in an information or indictment, a charge that defendant unlawfully, feloniously, etc., sold a certain quantity of morphine was sufficient, as against the contention that it was fatally defective for failure to aver that morphine is a derivative of opium. State v. Vallie, 82 M 456, 463, 268 P 493.

Collateral References

Indictment and Information 5 62. 42 C.J.S. Indictments and Informations § 99, 100, 113.

94-6415. (11855) Judgments, etc., how pleaded. In pleading a judgment or other determination of, or proceeding before a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial.

History: En. Sec. 91, p. 232, Bannack Stat.; re-en. Sec. 173, p. 217, Cod. Stat. 1871; re-en. Sec. 173, 3d Div. Rev. Stat. 1879; re-en. Sec. 173, 3d Div. Comp. Stat. 1887; amd. Sec. 1844, Pen. C. 1895; re-en. Sec. 9159, Rev. C. 1907; re-en. Sec. 11855, R. C. M. 1921. Cal. Pen. C. Sec. 962.

Collateral References

Judgment € 949 (2). 50 C.J.S. Judgments §§ 827, 833.

94-6416. (11856) **Private statutes, how pleaded.** In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

History: En. Sec. 92, p. 232, Bannack Stat.; re-en. Sec. 174, p. 217, Cod. Stat. 1871; re-en. Sec. 174, 3d Div. Rev. Stat. 1879; re-en. Sec. 174, 3d Div. Comp. Stat. 1887; amd. Sec. 1845, Pen. C. 1895; re-en. Sec. 9160, Rev. C. 1907; re-en. Sec. 11856, R. C. M. 1921. Cal. Pen. C. Sec. 963.

Collateral References

Statutes 280.
82 C.J.S. Statutes §§ 445, 446.

94-6417. (11857) Pleading for libel. An indictment or information for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally, that the same was published concerning him, and the fact that it was so published must be established on the trial.

History: En. Sec. 190, p. 218, Cod. Stat. 1871; re-en. Sec. 190, 3d Div. Rev. Stat. 1879; re-en. Sec. 190, 3d Div. Comp. Stat. 1887; amd. Sec. 1846, Pen. C. 1895; re-en. Sec. 9161, Rev. C. 1907; re-en. Sec. 11857, R. C. M. 1921. Cal. Pen. C. Sec. 964.

Collateral References

Libel and Slander \$\sim 152 (4).
53 C.J.S. Libel and Slander \$ 293 et seq.
33 Am. Jur. 301 et seq., Libel and Slander, \$ 323 et seq.

94-6418. (11858) Pleading for forgery, where instrument has been destroyed or withheld by defendant. When an instrument which is the subject of an indictment or information for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial.

History: En. Sec. 191, p. 219, Cod. Stat. 1871; re-en. Sec. 191, 3d Div. Rev. Stat. 1879; re-en. Sec. 191, 3d Div. Comp. Stat. 1887; amd. Sec. 1847, Pen. C. 1895; re-en. Sec. 9162, Rev. C. 1907; re-en. Sec. 11858, R. C. M. 1921. Cal. Pen. C. Sec. 965.

Collateral References

Forgery \$\infty 28 (5). 37 C.J.S. Forgery \\$ 57. 36 Am. Jur. 2d 701, Forgery, \\$ 37.

94-6419. (11859) Pleading for perjury or subornation of perjury. In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.

History: En. Sec. 192, p. 219, Cod. Stat. 1871; re-en. Sec. 192, 3d Div. Rev. Stat. 1879; re-en. Sec. 192, 3d Div. Comp. Stat. 1887; amd. Sec. 1848, Pen. C. 1895; re-en. Sec. 9163, Rev. C. 1907; re-en. Sec. 11859, R. C. M. 1921. Cal. Pen. C. Sec. 966.

Operation and Effect

An information charging perjury as having been committed in swearing at a criminal trial that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, held sufficient, where any person of ordinary intelligence could not, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon; nor was it rendered insufficient by the ungrammatical use of the word "knowing" where "knowingly" should have been employed. State v. Jackson, 88 M 420, 428, 293 P 309.

If an information for perjury sets forth

the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. State v. Jackson, 88 M 420, 428, 293 P 309.

Collateral References

Perjury = 19 (1) et seq. 70 C.J.S. Perjury § 31 et seq.; § 82 et seq. 41 Am. Jur., Perjury, p. 20, § 33 et seq.; p. 41, § 75.

Description in indictment of proceeding in which perjury was committed, 24 ALR 1137.

Sufficiency of general averment as to materiality of false statement. 80 ALR 1443.

94-6420. (11860) Pleading for larceny or embezzlement. In an indictment or information for the larceny or embezzlement of money, banknotes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, banknotes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

History: En. Sec. 1849, Pen. C. 1895; re-en. Sec. 9164, Rev. C. 1907; re-en. Sec. 11860, R. C. M. 1921. Cal. Pen. C. Sec. 967.

Operation and Effect

In an information charging larceny by a bailee it is not necessary to describe the money. State v. Hall, 45 M 498, 125 P 639.

While shares of stock of a corporation constitute the property and a certificate representing them is only evidence of the property, yet since title to the shares may be transferred by the certificate and the distinction between the stock and the certificate is largely artificial, the certificate, like the stock, is the subject of larceny. State v. Letterman, 88 M 244, 255, 292 P 717.

Collateral References

Embezzlement 28; Larceny 30 (7-11).

29A C.J.S. Embezzlement § 29; 52A

C.J.S. Larceny § 73 et seq. 26 Am. Jur. 2d 591, Embezzlement, § 39; 32 Am. Jur. 1018 et seq., Larceny, § 106 et seq.

Laying ownership of property in hus-

band or wife. 2 ALR 352.

Necessity of alleging incorporation or legal entity of owner of property not a natural person. 88 ALR 485.

Sufficiency of description of automobile or automobile equipment or accessories in indictment for larceny. 10 ALR 791.

Indictment for larceny of real property or things savoring of real property. 131 ALR 146.

94-6421. (11861) Pleading for selling, exhibiting, etc., lewd and obscene books. An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof.

History: En. Sec. 1850, Pen. C. 1895; re-en. Sec. 9165, Rev. C. 1907; re-en. Sec. 11861, R. C. M. 1921, Cal. Pen. C. Sec. 968.

Collateral References

Obscenity 2.

67 C.J.S. Obscenity § 9 et seq. 33 Am. Jur. 24, Lewdness, Indecency and Obscenity, § 17.

(11862) Repealed—Chapter 196, Laws of 1967. 94-6422.

Repeal

Section 94-6422 (Sec. 93, p. 232, Bannack Stat.), relating to acquittal of one or more defendants under indictment against several, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1504 and 95-1915.

94-6423. (11863) Distinction between accessory before the fact and principal abrogated. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory, than are required in an indictment or information against his principal.

History: En. Sec. 1852, Pen. C. 1895; re-en. Sec. 9167, Rev. C. 1907; re-en. Sec. 11863, R. C. M. 1921. Cal. Pen. C. Sec. 971.

Constitutionality

This section does not violate constitutional provision guaranteeing to an accused the right to demand the nature and cause of the accusation. Geddes, 22 M 68, 87, 55 P 919.

"Advise and Encourage"

An instruction should follow the language of the statute, and state that accessories are those who "advise and encourage," instead of "advise or encourage," the commission of crime. State v. Geddes, 22 M 68, 88, 55 P 919.

Aiding and Abetting

While the statute defines larceny as the taking of property from the person of another yet it is sufficient to show the defendant's guilt that he aided or abetted in the commission of the crime. State v. Maciel, 130 M 569, 305 P 2d 335, 336.

Confusing Prior Knowledge with Aiding or Abetting

The mere knowledge in a person that a crime is about to be committed does not constitute him an accomplice; nor does the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the particular theft nor even to give him the knowledge that it was to be committed. State v. Mercer, 114 M 142, 149, 133 P 2d 358.

Instructions

Where a verbal declaration of one codefendant that he and the other codefendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declaration is insufficient to establish a partnership. Although a partnership was immaterial because of this section and section 94-204, yet the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. State v. Keller, 126 M 142, 246 P 2d 817, 821.

Object of Statute

The object of the code was to put the principal and the agent upon the same legal ground, and to authorize the principal to be charged as if he himself had committed the felony in fact perpetrated by his agent by his advice and encouragement. State v. Geddes, 22 M 68, 88, 55 P 919.

Operation and Effect

An indictment for murder, charging defendant as principal, is sustained by proof that he was guilty of advising and encouraging the crime. State v. Geddes, 22 M 68, 86, 55 P 919.

The distinction between accessories before the fact and principals is abrogated, and all are treated as principals. State v. De Wolfe, 29 M 415, 423, 74 P 1084, overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

In a prosecution for arson, where there is some testimony that defendant procured another to set the fire, the giving of instructions, embodying the provisions of this section and section 94-204, is proper;

as is also the refusing of others, directing the jury to find for the defendant, unless they are satisfied beyond a reasonable doubt that he was present personally and set the fire himself. State v. Chevigny, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of this section and section 94-204, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. State v. Wiley, 53 M 383, 387, 164 P 84.

Under an information charging receipt of stolen property by one who became a principal because he aided and abetted another in receiving it, the claim of fatal variance between the crime as alleged and the proof, showing him to have taken part only as an accessory, has no merit. State v. Huffman, 89 M 194, 203, 296 P 789.

Where a stock detective solicited one to assist him in the larceny of cattle for the purpose of convicting another of the crime, and the person so solicited on arrival at the scene of the intended taking declined to participate, he was not a principal to the crime, and hence, the one upon whom the crime was sought to be fastened, could not, under this section, have become his accessory. State v. Neely, 90 M 199, 211, 300 P 561.

Although, under the facts stated, defendant, who it appeared advised and encouraged the theft of a calf, under section 94-204 was an accomplice or accessory before the fact and therefore a principal to the actual theft under this section abrogating the distinction, and by legal fiction had constructive possession, but since he later obtained physical possession, the state may elect to prosecute him for receiving stolen property and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. State v. Webber, 112 M 284, 301, 116 P 2d 679.

Second Degree Assault

Under this section and section 94-204, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. State v. Simon, 126 M 218, 247 P 2d 481, 485.

Under this section an information containing a single count charging the crime of second degree assault, as defined in section 94-602, was proper where only one crime was involved, namely, second degree

assault, with at least two different ways of committing that crime; one by a direct assault and the other by aiding and abetting. State v. Zadick, 148 M 296, 419 P 2d 749, 751.

Collateral References

Criminal Law 61, 69; Indictment and Information 84.

22 C.J.S. Criminal Law § 90; 42 C.J.S. Indictments and Informations § 148.

21 Am. Jur. 2d 197 et seq., Criminal Law, § 121 et seq.; 41 Am. Jur. 2d 976 et seq., Indictment and Information, § 153 et seq.

94-6424. (11864) Indictment against accessory. An indictment or information against any accessory to any felony may be found in any county where the offense of such accessory may have been committed, notwithstanding the principal offense may have been committed in another county, and the like proceeding may be had therein in all respects, as if the principal offense had been committed in the same county.

History: En. Sec. 186, p. 218, Cod. Stat. 1871; re-en. Sec. 186, 3d Div. Rev. Stat. 1879; re-en. Sec. 186, 3d Div. Comp. Stat. 1887; re-en. Sec. 1853, Pen. C. 1895; re-en. Sec. 9168, Rev. C. 1907; re-en. Sec. 11864, R. C. M. 1921.

Cross-Reference

Venue, where person in one county commits or aids and abets commission of offense in another county, sec. 95-404.

Collateral References

Criminal Law 110. 22 C.J.S. Criminal Law § 184.

94-6425. (11865) Accessory may be indicted and tried, though principal has not been. An accessory to the commission of a felony may be prosecuted, tried, and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted.

History: Ap. p. Sec. 95, p. 232, Bannack Stat.; re-en. Sec. 177, p. 217, Cod. Stat. 1871; re-en. Sec. 177, 3d Div. Rev. Stat. 1879; re-en. Sec. 177, 3d Div. Comp. Stat. 1887; en. Sec. 1854, Pen. C. 1895;

re-en. Sec. 9169, Rev. C. 1907; re-en. Sec. 11865, R. C. M. 1921, Cal. Pen. C. Sec. 972.

Collateral References

Criminal Law 80. 22 C.J.S. Criminal Law 8104.

94-6426 to 94-6428. (11866 to 11868) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-6426 to 94-6428 (Secs. 96, 99, 100, pp. 232, 233, Bannack Stat.), relating to record of indictment or information, prohibiting disclosure of indictment or information until accused has been ar-

rested and authorizing conviction of offense charged, lesser degree, lesser included crime or attempt, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1409, 95-1503, and 95-1915.

94-6429. (11869) Allegation as to partnership property. When any offense is committed upon, or in relation to, any personal property belonging to several partners or owners, the indictment or information for such offense is sufficient if it allege such property to belong to any one or more of such partners or owners without naming them all.

History: En. Sec. 103, p. 233, Bannack Stat.; re-en. Sec. 185, p. 218, Cod. Stat. 1871; re-en. Sec. 185, 3d Div. Rev. Stat. 1879; re-en. Sec. 185, 3d Div. Comp. Stat. 1887; amd. Sec. 1858, Pen. C. 1895; re-en. Sec. 9173, Rev. C. 1907; re-en. Sec. 11869, R. C. M. 1921.

Cross-Reference

Charging an offense, form of charge, sec. 95-1503.

Collateral References

Indictment and Information ← 105. 42 C.J.S. Indictments and Informations § 143.

41 Am. Jur. 2d 974, Indictments and Informations, § 150.

94-6430 to 94-6434. (11870 to 11874) Repealed—Chapter 196, Laws of 1967.

Repeal.

Sections 94-6430 to 94-6434 (Secs. 1859 to 1861, 2590, 2600, Pen. C. 1895), relating to amendments at trial, effect of verdict, defectively entitled affidavits and immaterial departures from form prescribed by code, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1505 and 95-1506.

CHAPTER 65

ARRAIGNMENT OF DEFENDANT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6501 to 94-6516. (11875 to 11890) Repealed.

Repeal

Sections 94-6501 to 94-6516 (Secs. 193, 196, 199 to 204, pp. 220, 221, Cod. Stat. 1871; Sec. 1, p. 12, L. 1881; Secs. 1880 to 1895, Pen. C. 1895; Sec. 1, Ch. 33, L. 1903;

Sec. 1, Ch. 38, L. 1949), relating to arraignment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-902, 95-1005, 95-1102, 95-1107, 95-1602 to 95-1604.

CHAPTER 66

SETTING ASIDE THE INDICTMENT OR INFORMATION

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-6601 to 94-6605. (11891 to 11895) Repealed.

Repeal

Sections 94-6601 to 94-6605 (Secs. 205, 207 to 210, pp. 221, 222, Cod. Stat. 1871; Secs. 1910 to 1914, Pen. C. 1895), relat-

ing to setting aside the indictment or information, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1702 and 95-1704.

CHAPTER 67

DEMURRER

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6701 to 94-6711. (11896 to 11906) Repealed.

Sections 94-6701 to 94-6711 (Secs. 211, 212, 215, 216, p. 222, Cod. Stat. 1871; Sec. 1, p. 73, L. 1885; Secs. 1920 to 1930, Pen. C. 1895; Sec. 2, Ch. 172, L. 1961), relating to demurrers, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see sec. 95-1702.

CHAPTER 68

PLEAS

Section 94-6801 to 94-6808. Repealed.

Definition of terms. 94-6808.1

Method of prosecution when conduct constitutes more than one 94-6808.2. offense.

When prosecution barred by former prosecution. 94-6808.3.

94-6808.4.

Former prosecution in another jurisdiction—when a bar. Former prosecution before court lacking jurisdiction or when fraud-94-6808.5. ulently procured by the defendant.

94-6809. Repealed. 94-6801 to 94-6805. (11907 to 11911) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-6801 to 94-6805 (Secs. 217, 218, 221, pp. 222, 223, Cod. Stat. 1871; Secs. 1940 to 1944, Pen. C. 1895), relating

to pleas, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1606, 95-1607, 95-1901, and 95-1902.

94-6806 to 94-6808. (11912 to 11914) Repealed—Chapter 228, Laws of 1969.

Repeal

Sections 94-6806 to 94-6808 (Secs. 222 to 224, p. 223, Cod. Stat. 1871; Secs. 1945

to 1947, Pen. C. 1895), relating to former acquittals, were repealed by Sec. 6, Ch. 228, Laws 1969.

94-6808.1. Definition of terms. (a) Same transaction. The term same transaction shall include conduct consisting of:

- (1) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or
- (2) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.
 - (b) Included offense. An offense is an included offense when:
- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (2) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (3) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

History: En. Sec. 1, Ch. 228, L. 1969.

- 94-6808.2. Method of prosecution when conduct constitutes more than one offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
 - (a) one offense is included in the other; or
- (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or
- (c) inconsistent findings of fact are required to establish the commission of the offenses; or
- (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
- (e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of such conduct constitute separate offenses.

History: En. Sec. 2, Ch. 228, L. 1969.

Collateral References

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transactions. 78 ALR 1213.

Conviction or acquittal under charge of

assault with intent to rob as bar to prosecution for assault with intent to kill based on same transaction or on closely connected transactions. 81 ALR 701.

Conviction or acquittal on charge which includes element of illicit sexual inter-course as bar to prosecution for adultery.

94 ALR 405.

DECISIONS UNDER FORMER LAW

"Necessarily Included"

"Offense necessarily included," as used in former statute making conviction, acquittal or jeopardy on a prior charge a bar to subsequent prosecution for an offense necessarily included therein, meant a lower degree of the crime charged, or a minor offense of the same character, predicated on the same act or acts. State v. Gaimos, 53 M 118, 122, 162 P 596.

Where an information charging rape was dismissed after commencement of trial but before verdict, and a new one filed fixing the time of the commission of the crime fifty days later, the defense of once in jeopardy was not available, since the offense charged in the second information was neither the same nor one "necessarily included" in the first charge, within the meaning of former statute. State v. Gaimos, 53 M 118, 122, 162 P 596.

- 94-6808.3. When prosecution barred by former prosecution. Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:
- The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.
- The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.
- The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:
- a judgment of conviction which has not been reversed or vacated,
- (2) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant,
- a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.
- The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and

it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

- The defendant consents to the termination or waives his right to object to the termination.
- The trial court, in the exercise of its discretion, finds that the termination is necessary because:
 - (i) it is physically impossible to proceed with the trial in conformity with law; or
 - (ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or
 - (iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or
 - (iv) the jury is unable to agree upon a verdict; or
 - false statements of a juror on voir dire prevent a fair trial.

History: En. Sec. 3, Ch. 228, L. 1969.

Mistrial

Where a person charged with crime, after a trial, is neither convicted nor acquitted, but, owing to a mistrial, the jury is discharged and the trial ended, he may again be put upon trial for the same of-fense, and the defense of once in jeopardy will not lie. State v. Keerl, 33 M 501, 511, 85 P 862, affirmed in 213 US 135, 53 L Ed 734, 29 S Ct 469.

New Trial

After a verdict on a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except where a new trial has been granted or ordered. State v. Keerl, 33 M 501, 511, 85 P 862, affirmed in 213 US 135, 53 L Ed 734, 29 S Ct 469.

Collateral References

Criminal Law 161 et seq. 22 C.J.S. Criminal Law § 238 et seq.; 22A C.J.S. Criminal Law § 476. 21 Am. Jur. 2d 231 et seq., Criminal

Law, § 165 et seq.

Plea of former jeopardy or of former conviction or acquittal where jury was not sworn, 12 ALR 1006.
Conviction or acquittal of larceny as

bar to prosecution for burglary. 19 ALR

Conviction or acquittal upon charge of murder of one person as bar to prosecution for like offense against another person at the same time. 20 ALR 341 and 113 ALR

Acquittal as bar to a prosecution of accused for perjury committed at trial. 37 ALR 1290.

Conviction or acquittal in one district as bar to prosecution in another, based on continuous transportation of intoxicating

liquor. 73 ALR 1511. Plea of double jeopardy where jury was discharged because of inability of prose-

cution to present testimony. 74 ALR 803.

Double jeopardy where jury is discharged before termination of trial because of illness of accused. 159 ALR 750.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 ALR 3d

- 94-6808.4. Former prosecution in another jurisdiction—when a bar. When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
- (a) The first prosecution resulted in an acquittal or in a conviction as defined in section 94-6808.3 and the subsequent prosecution is based on an offense arising out of the same transaction.
- The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the

defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

History: En. Sec. 4, Ch. 228, L. 1969.

- 94-6808.5. Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant. A prosecution is not a bar within the meaning of sections 94-6808.3 and 94-6808.4 under any of the following circumstances:
- (a) The former prosecution was before a court which lacks jurisdiction over the defendant or the offense; or
- (b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or
- (c) The former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

History: En. Sec. 5, Ch. 228, L. 1969.

94-6809. (11915) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-6809 (Sec. 135, p. 237, Bannack Stat.), relating to entry of plea of

not guilty if defendant refuses to answer, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1606.

CHAPTER 69

CHANGE OF PLACE OF TRIAL OR JUDGE

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-6901 to 94-6913. (11916 to 11927) Repealed.

Reneal

Sections 94-6901 to 94-6913 (Secs. 145, 146, 151 to 153, pp. 238 to 240, Bannack Stat.; Secs. 225 to 229, 233 to 235, pp. 223 to 225, Cod. Stat. 1871; Secs. 1970 to

1981, Pen. C. 1895; Sec. 1, Ch. 61, L. 1959; Sec. 1, Ch. 112, L. 1965), relating to change of place of trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1709 and 95-1710.

CHAPTER 70

MODE OF TRIAL—FORMATION OF JURY AND CALENDAR OF ISSUES—POSTPONEMENT OF TRIAL

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7001 to 94-7013. (11928 to 11940) Repealed.

Repeal

Sections 94-7001 to 94-7013 (Secs. 165, 166, pp. 242, 243, Bannack Stat.; Secs. 269 to 273, 282, 291, pp. 232 to 235, Cod. Stat. 1871; Secs. 1960, 1990 to 1992, 2000 to 2003, 2010 to 2014, Pen. C. 1895), relating

to mode of trial, formation of jury and calendar of issues and postponement of trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1301, 95-1410, 95-1708, 95-1901, and 95-1904 to 95-1907

CHAPTER 71

CHALLENGING THE JURY

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7101 to 94-7128. (11941 to 11968) Repealed.

Sections 94-7101 to 94-7128 (Secs. 156, 157, p. 241, Bannack Stat.; Secs. 277, 278, 283 to 286, pp. 233, 234, Cod. Stat. 1871; Sec. 1, p. 54, L. 1881; Secs. 2030 to 2057, Pen. C. 1895; Sec. 1, Ch. 4, L. 1925), relating to challenges to the jury, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1908 and 95-1909.

CHAPTER 72

THE TRIAL

Section 94-7201. Repealed.

94-7202. Repealed.

94-7203. Defendant presumed innocent—reasonable doubt. 94-7204. Reasonable doubt as to degree convicts only of lowest.

94-7205. Repealed.

94-7206. Discharging defendant that he may be a witness.

94-7207. Discharging defendant that he may be a witness. 94-7208.

Effect of such discharge. Rules of evidence in civil actions applicable to criminal cases. 94-7209.

94-7210. Evidence on trial for treason.

94-7211. Evidence on trial for conspiracy.

94-7212. When burden of proof shifts in trial for murder.

94-7213. All witnesses need not be called. 94-7214. Evidence on a trial for bigamy.

Evidence upon a trial for forging bank bills, etc. 94-7215.

94-7216. Evidence upon trial for abortion and enticing females for purpose of

prostitution. 94-7217.

Proof of corporation by reputation. Evidence on a trial for selling, etc., lottery tickets. 94-7218.

94-7219.

Evidence of false pretenses. Conviction on testimony of accomplice. 94-7220.

94-7221 to 94-7239. Repealed. 94-7240. Trials for larceny.

94-7201, 94-7202. (11969, 11970) Repealed—Chapter 196, Laws of 1967.

Sections 94-7201 and 94-7202 (Sec. 2071, Pen. C. 1895; Sec. 1, Ch. 82, L. 1907), relating to order of trial and departures therefrom, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1910 and 95-1911.

94-7203. (11971) Defendant presumed innocent—reasonable doubt. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

History: Ap. p. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 307, 3d Div. Rev. Stat. 1879; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2072, Pen. C. 1895; re-en. Sec. 9273, Rev. C. 1907; re-en. Sec. 11971, R. C. M. 1921. Cal. Pen. C. Sec. 1096.

NOTE.—Due to the frequent citation to the instruction of Chief Justice Shaw

on "reasonable doubt," found in Commonon "reasonable doubt," found in Common-wealth v. Webster, 59 Mass. (5 Cush.) 295, 320, 52 Am. Dec. 711, the noted passage is here printed for convenience. "Then, what is a reasonable doubt! It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every-thing relating to human affairs, and de-pending on moral evidence is onen to pending on moral evidence, is open to some possible or imaginary doubt. It is

that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

Burden of Proof

In criminal cases the burden of proof never shifts, but the burden of the evidence may shift frequently. State v. Moorman, 133 M 148, 321 P 2d 236, 238.

In a prosecution for grand larceny, an instruction which had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives defendant of his cloak of innocence and forces him to testify. State v. Greeno, 135 M 580, 342 P 2d 1052.

Operation and Effect

In a prosecution for the crime of carrying a concealed weapon, wherein the defendant was found guilty by a jury, it was held on appeal that in view of the uncertainty in the mind of the state's only eyewitness as compared with witnesses for the defendant, coupled with the effect of this section, the evidence was not sufficient to justify a conviction for the crime charged. State v. Gilbert, 125 M 104, 232 P 2d 338, 341.

"Reasonable Doubt"-Instructions

While the court has frequently approved as correct and sufficient to meet all requirements the instruction taken from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320, 52 Am. Dec. 711, (Territory v. McAndrews, 3 M 158; State v.

Martin, 29 M 273, 74 P 725; State v. De Lea, 36 M 531, 93 P 814), error was not committed in submitting the following instruction "the term reasonable doubt best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture." (Chief Justice Brantly). State v. Lewis, 52 M 495, 502, 159 P 415.

Held, on appeal from a judgment of conviction of murder in the first degree, that the trial court in giving the definition of "reasonable doubt" in an instruction on the subject repeatedly approved by the supreme court, did not commit reversible error by prefacing it thus: "You are instructed that a doubt which a juror is allowed to retain in his mind and under the influence of which he should form a verdict of not guilty, must always be a reasonable one," and that the contention of appellant that the phrase in effect does away with the presumption of innocence declared by this section, may not be sustained. State v. Zorn, 99 M 63, 65, 41 P 2d 513.

An instruction on "reasonable doubt" not strictly adhering to the one given by Chief Justice Shaw in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320, 52 Am. Dec. 711, and generally followed by courts, but adding inter alia that the jury is "not at liberty to disbelieve as jurors if you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered," held not erroneous, the court being of opinion that decision holding that the term "reasonble doubt" defines itself is the most logical of a large number of authorities reviewed. State v. Wong Sun, 114 M 185, 194, 133 P 2d 761; State v. Curtiss, 114 M 232, 242, 135 P 2d 361.

"Reasonable Doubt"-Instructions

Instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove effect of that fact as a circumstance to be considered with other evidence pointing to guilt, did not deprive the defendant of the presumption of innocence. State v. Gray, — M —, 447 P 2d 475.

Collateral References

Criminal Law \$308, 561 (1). 22A C.J.S. Criminal Law § 581; 23 C.J.S. Criminal Law §§ 910-913. 29 Am. Jur. 2d 180, Evidence, § 148. 94-7204. (11972) Reasonable doubt as to degree convicts only of lowest. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

History: Ap. p. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2073, Pen. C. 1895; re-en. Sec. 9274, Rev. C. 1907; re-en. Sec.

11972, R. C. M. 1921. Cal. Pen. C. Sec. 1097.

Collateral References

Criminal Law \$571. 23 C.J.S. Criminal Law \$925.

94-7205. (11973) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-7205 (Sec. 301, p. 236, Cod. Stat. 1871), relating to separate trials,

was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1504.

94-7206. (11974) Discharging defendant that he may be a witness. When two or more persons are included in the same charge, the court may, at any time, before the defendants have gone into their defense, on the application of the county attorney, direct any defendant to be discharged, that he may be a witness for the state.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; amd. Sec. 2075, Pen. C. 1895; re-en. Sec. 9276, Rev. C. 1907; re-en. Sec. 11974, R. C. M. 1921. Cal. Pen. C. Sec. 1099.

Cross-Reference

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

Collateral References

Criminal Law©=302 (2). 22A C.J.S. Criminal Law §§ 457-459.

94-7207. (11975) Discharging defendant that he may be a witness. When two or more persons are included in the same indictment or information, and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; en. Sec. 2076, Pen. C. 1895; re-en. Sec. 9277, Rev. C. 1907; re-en. Sec. 11975, R. C. M. 1921. Cal. Pen. C. Sec. 1100.

Cross-Reference

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

Collateral References

Criminal Law \$302 (1). 22A C.J.S. Criminal Law \$\$458, 459, 461-463.

94-7208. (11976) Effect of such discharge. The order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; en. Sec. 2077, Pen. C. 1895; re-en. Sec. 9278, Rev. C. 1907; re-en. Sec. 11976, R. C. M. 1921. Cal. Pen. C. Sec. 1101.

Cross-Reference

Charging an offense, joinder of offenses and defendants, sec. 95-1504.

Collateral References

Criminal Law 178. 22 C.J.S. Criminal Law §§ 254, 256, 257. 94-7209. (11977) Rules of evidence in civil actions applicable to criminal cases. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code.

History: En. Sec. 2078, Pen. C. 1895; re-en. Sec. 9279, Rev. C. 1907; re-en. Sec. 11977, R. C. M. 1921. Cal. Pen. C. Sec. 1102.

Accused as a Witness

Where a defendant in a criminal cause becomes a witness in his own behalf he is subject to the same rules of cross-examination and impeachment as any other witness; hence a question whether he had not suffered the previous convictions charged in the information was proper. State v. O'Neill, 76 M 526, 535, 248 P 215.

Act or Declaration of Conspirator

Evidence of the act or declaration of a conspirator relating to the conspiracy may, after proof of the conspiracy, be given against his co-conspirator. Territory v. Campbell, 9 M 16, 20, 22 P 121; State v. Byers, 16 M 565, 567, 41 P 708; Harrington v. Butte & Boston Min. Co., 19 M 411, 419, 48 P 758; Pincus v. Reynolds, 19 M 564, 569, 49 P 145; State v. Dotson, 26 M 305, 309, 67 P 938; Lane v. Bailey, 29 M 548, 557, 75 P 191.

Adverse Witness Statute

In a criminal case the state is the opposite party to the defendant, and former section 93-1901-9, relating to calling the opposite party, is not applicable to a criminal proceeding. State v. Moorman, 133 M 148, 321 P 2d 236, 238.

Inspection of Writings

Even if section 93-8301 (now superseded by M. R. Civ. P., Rule 34) was made applicable to criminal cases by this section, defendant was not entitled to the inspection of written material, where there was no showing as to what the material consisted of, whether it was relevant to the defense, or that it was admissible in evidence. State ex rel. Keast v. District Court, 135 M 545, 342 P 2d 1071.

Physician-Patient Privilege

The physician-patient privilege is not available to a defendant in a criminal action since the qualifying language "in a civil action," used in section 93-701-4, subsection (4), specifically limits the privilege to civil actions and is thus within the exception of this section. State v. Campbell, 146 M 251, 405 P 2d 978.

Statement Explaining Constitutional Rights

Trial court did not err in permitting state's witness to read entire statement wherein defendant was warned of constitutional rights and which was signed by defendant since statement was material as evidence that defendant's constitutional rights and waiver thereof were clearly and understandably enunciated. State v. Lucero, 151 M 531, 445 P 2d 731.

Where Alterations Appeared in Written Confession

Where alterations appeared in an alleged written confession of defendant charged with crime, it was incumbent upon the state, under section 93-1501-2, relating to writings offered in evidence as exhibits in civil cases but made applicable to criminal cases by this section, to account for them before it is admissible in evidence; in the instant case defendant testified that the writing was inaccurate. State v. Crighton, 97 M 387, 401, 34 P 2d 511.

Collateral References

Criminal Law 304 (1) et seq. 22A C.J.S. Criminal Law 530 (2). See generally, 29 Am. Jur. 2d 1, Evidence.

94-7210. (11978) Evidence on trial for treason. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

History: Ap. p. Sec. 169, p. 243, Bannack Stat.; re-en. Sec. 294, p. 235, Cod. Stat. 1871; re-en. Sec. 294, 3d Div. Rev. Stat. 1879; re-en. Sec. 295, 3d Div. Comp. Stat. 1887; en. Sec. 2079, Pen. C. 1895; re-en. Sec. 9280, Rev. C. 1907; re-en. Sec. 11978, R. C. M. 1921. Cal. Pen. C. Sec. 1103.

Collateral References

Treason \$\infty 12, 13.

87 C.J.S. Treason \$\xi 4, 12, 13.

52 Am. Jur. 802, Treason, \$\xi 16, 17.

94-7211. (11979) Evidence on trial for conspiracy. Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

History: En. Sec. 170, p. 243, Bannack Stat.; re-en. Sec. 295, p. 235, Cod. Stat. 1871; re-en. Sec. 295, 3d Div. Rev. Stat. 1879; re-en. Sec. 296, 3d Div. Comp. Stat. 1887; amd. Sec. 2080, Pen. C. 1895; re-en. Sec. 9281, Rev. C. 1907; re-en. Sec. 11979, R. C. M. 1921. Cal. Pen. C. Sec. 1104.

Collateral References

Conspiracy 34 (5), 46. 15A C.J.S. Conspiracy §§ 88, 92. 16 Am. Jur. 2d, Conspiracy, p. 133, § 11; p. 145 et seq., § 34 et seq.

94-7212. (11980) When burden of proof shifts in trial for murder. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

History: En. Sec. 33, p. 182, Bannack Stat.; re-en. Sec. 40, p. 276, Cod. Stat. 1871; re-en. Sec. 40, 4th Div. Rev. Stat. 1879; re-en. Sec. 40, 4th Div. Comp. Stat. 1887; amd. Sec. 2081, Pen. C. 1895; re-en. Sec. 9282, Rev. C. 1907; re-en. Sec. 11980, R. C. M. 1921. Cal. Pen. C. Sec. 1105.

Cross-Reference

Fact of killing to be proved, sec. 94-2510.

Extent of Proof for Matters of Justification

Upon the conclusion of the state's case, where no evidence of insanity has been introduced, the burden devolves upon the defendant to produce some proof of his insanity, and when he has introduced sufficient to raise a reasonable doubt as to his sanity, he is entitled to an acquittal, unless such evidence is successfully rebutted by the state. State v. Peel, 23 M 358, 374, 59 P 169.

An instruction defining the term "preponderance of the evidence" has no place in a criminal trial. Under this section, no greater burden rests upon the defendant than to introduce sufficient evidence to raise a reasonable doubt as to the existence of such so-called affirmative defenses as alibi, insanity, and justification. State v. Felker, 27 M 451, 461, 71 P 668.

Where the evidence on the part of the prosecution, in a case of homicide, tends to show that the killing amounted to murder, the burden is upon the defendant to prove circumstances of mitigation, or that justified or excused the killing; but, concerning the quantum of proof, if he raises a reasonable doubt of his guilt, he should be acquitted. State v. Crean, 43 M 47, 55, 114 P 603.

Where the proof of the prosecution, that is, the effect of all the evidence introduced by it, makes out the defense upon which one charged with crime relies, by raising a reasonable doubt of his guilt, defendant may, under this section, avail himself of such defense without proof on his part. State v. Powell, 54 M 217, 220, 169 P 46.

State v. Powell, 54 M 217, 220, 169 P 46.

Although the defendant, in a prosecution for homicide, may avail himself of an affirmative defense established by evidence for the prosecution, it is error to instruct the jury that if any proof offered by the state tends to show that the defendant was "excused or justified" in the killing, then they must acquit him. State v. Powell, 54 M 217, 220, 169 P 46.

Instructions

Where this section is given as an instruction, it is not error to omit therefrom the last clause commencing with the word "unless," when the evidence of the prosecution contains nothing tending to mitigate, justify or excuse the homicide, the effect of such instruction being to make it imperative upon the defense to introduce such evidence. State v. Colbert, 58 M 584, 591, 194 P 145.

The contention of defendant that since no one was present when the shot which killed deceased was fired, the court erred in giving an instruction in the words of this section, heretofore construed to mean that if the jury should find the fact that defendant did the killing, the burden of proving circumstances mitigating the offense from murder to manslaughter or justifying it devolves upon him, unless the evidence which proves the killing by the defendant also shows that it was manslaughter or justifiable, held without merit. State v. Davis, 60 M 426, 440, 199 P 421.

In a prosecution for murder, where the fact that defendant killed deceased was established, and there were no circumstances tending to justify or excuse the act, it was not error to instruct, in the language of this section, that, the commission of the homicide being proved, the burden of proving circumstances of mitigation, justification, or excuse devolved on defendant, unless the state's proof showed the crime amounted only to manslaughter, or that defendant was justifiable or excusable. State v. Bess, 60 M 558, 575, 199 P 426.

Operation and Effect

The state having proved the killing by the defendant without evidence tending to show that the act amounts to manslaughter, or that the conduct is justifiable or excusable, the crime is presumed to be murder of the second degree. If the state would raise the crime to murder of the first degree, the burden is upon it to prove deliberation; on the other hand, if the defendant would reduce the crime to manslaughter, there must be produced evidence sufficient to create a reasonable doubt of the existence of malice. State v. Fisher, 23 M 540, 546, 59 P 919; State v. Kuum, 55 M 436, 446, 178 P 288.

In a prosecution for murder, the burden of proving circumstances of mitigation or justification is on the defendant. State v.

Byrd, 41 M 585, 596, 111 P 407.

In a prosecution for murder, the duty of showing excuse or palliating circumstances, or of adducing evidence of facts sufficient to raise in the minds of the jurors a reasonable doubt of the defendant's guilt, is upon the accused. State v. Leakey, 44 M 354, 366, 120 P 234. See also State v. Sheldon, 54 M 185, 192, 169 P 37.

Appellant, who was charged with homicide, was in no position to complain of an instruction which, by failing to give the rule embodied in this section, to the effect that the burden of proving circumstances of mitigation, justification, or excuse de-volves upon defendant, impliedly told the jury that the burden did not rest upon him at any stage of the case. State v. Halk, 49 M 173, 175, 141 P 149.

While this section declares the circumstances under which the burden of proof shifts to the defendant, he is not at any time required to bear a greater burden than to go forward with his proofs far enough to create in the minds of the jurors a reasonable doubt as to his guilt. The burden of proof, as these words are used in the criminal law, is never upon the defendant to disprove the facts necessary to establish the crime with which he is charged. It is upon the state from the beginning to the end of the trial. State v. Halk, 49 M 173, 175, 141 P 149.

Under this section, the accused, in a prosecution for murder, must, where he relies upon self-defense, after proof that a homicide was committed by him, assume the burden of furnishing sufficient evidence to raise a reasonable doubt of his guilt. State v. Powell, 54 M 217, 220, 169

When a homicide is established, nothing else appearing, the presumption of innocence is overcome, and the presumption establishing malicious intent comes to the aid of the prosecution. State v. Colbert, 58 M 584, 591, 194 P 145.

Collateral References

Homicide 151 (1). 40 C.J.S. Homicide §§ 196, 197. 40 Am. Jur. 2d 515, Homicide, § 246.

94-7213. (11981) All witnesses need not be called. Upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who are shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and exam-

History: En. Sec. 2082, Pen. C. 1895; re-en. Sec. 9283, Rev. C. 1907; re-en. Sec. 11981, R. C. M. 1921.

Court's Discretion

Under this section it is discretionary with the court whether all witnesses present at a homicide should be sworn and examined, and it is only where the refusal to order such witnesses to be placed on the stand constitutes an abuse of discretion that reversible error is committed. State v. Rolla, 21 M 582, 55 P 523.

It is discretionary with the trial court whether all persons who are shown to have been present at a homicide shall be

sworn and examined in behalf of the state, and exercise of its discretion will be corrected only in case of abuse. State v. Tighe, 27 M 327, 336, 71 P 3, overruled on other grounds in State v. Sherman, 35 M 512, 518, 90 P 981.

Refusal of the court to require the state to call and examine an eyewitness to the crime whose name was endorsed on the information was proper. Inich, 55 M 1, 13, 173 P 230.

Collateral References

Homicide €= 266. 41A C.J.S. Homicide § 337. 94-7214. (11982) Evidence on a trial for bigamy. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge.

History: Ap. p. Sec. 140, p. 302, Cod. Stat. 1871; re-en. Sec. 140, 4th Div. Rev. Stat. 1879; re-en. Sec. 155, 4th Div. Comp. Stat. 1887; amd. Sec. 2083, Pen. C. 1895; re-en. Sec. 9284, Rev. C. 1907; re-en. Sec. 11982, R. C. M. 1921. Cal. Pen. C. Sec. 1106.

Collateral References

Bigamy \$\infty\$ 9, 10.
10 C.J.S. Bigamy \\$\\$ 18, 20.
10 Am. Jur. 2d, Bigamy, p. 979, \\$ 14;
p. 1001 et seq., \\$ 47 et seq.

94-7215. (11983) Evidence upon a trial for forging bank bills, etc. Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill, or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

History: En. Secs. 96, 97, p. 290, Cod. Stat. 1871; re-en. Secs. 96, 97, 4th Div. Rev. Stat. 1879; re-en. Secs. 104, 105, 4th Div. Comp. Stat. 1887; re-en. Sec. 2084, Pen. C. 1895; re-en. Sec. 9285, Rev. C. 1907; re-en. Sec. 11983, R. C. M. 1921. Cal. Pen. C. Sec. 1107.

Collateral References

Criminal Law \$2400 (6), 478 (1). 22A C.J.S. Criminal Law \$695; 23 C.J.S. Criminal Law \$858. 36 Am. Jur. 2d 709-711, Forgery, \$\$49, 50

94-7216. (11984) Evidence upon trial for abortion and enticing females for purpose of prostitution. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence.

History: En. Sec. 2085, Pen. C. 1895; re-en. Sec. 9286, Rev. C. 1907; re-en. Sec. 11984, R. C. M. 1921. Cal. Pen. C. Sec. 1108.

Collateral References

Abortion \$\insigma 11; Prostitution \$\infty 4. 1 C.J.S. Abortion \$\§ 31-35; 73 C.J.S. Prostitution \$\§ 3-5, 7. 1 Am. Jur. 2d 209, Abortion, \$\§ 36; 42 Am. Jur. 276-278, Prostitution, \$\§ 22, 23; 47 Am. Jur. 647, Seduction, \$\§ 37 et seq.

94-7217. (11985) Proof of corporation by reputation. If upon a trial or proceeding in a criminal case, the existence, constitution, or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or act of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government or country by which such corporation was created.

History: En. Sec. 172, p. 243, Bannack Stat.; re-en. Sec. 297, p. 235, Cod. Stat. 1871; re-en. Sec. 297, 3d Div. Rev. Stat. 1879; re-en. Sec. 298, 3d Div. Comp. Stat. 1887; re-en. Sec. 2086, Pen. C. 1895; re-en. Sec. 9287, Rev. C. 1907; re-en. Sec. 11985, R. C. M. 1921.

Collateral References
Criminal Law \$5400 (6).
22A C.J.S. Criminal Law \$695.

94-7218. (11986) Evidence on a trial for selling, etc., lottery tickets. Upon a trial for the violation of any of the provisions of sections 94-3001 to 94-3011, it is not necessary to prove the existence of any lottery in which any lottery ticket purports to have been issued, or to prove the actual signing of any such ticket, or share, or pretended ticket or share, of any pretended lottery, nor that any lottery ticket, share or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, is evidence that such share or interest was signed and issued according to the purport thereof.

History: En. Sec. 2087, Pen. C. 1895; re-en. Sec. 9288, Rev. C. 1907; re-en. Sec. 11986, R. C. M. 1921. Cal. Pen. C. Sec. 1109.

Collateral References

Lotteries 27, 29. 54 C.J.S. Lotteries §§ 22, 23. 34 Am. Jur. 671, Lottery, § 31.

94-7219. (11987) Evidence of false pretenses. Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by testimony of two witnesses or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying or receiving any money or property.

History: En. Sec. 2088, Pen. C. 1895; re-en. Sec. 9289, Rev. C. 1907; amd. Sec. 1, Ch. 8, L. 1917; re-en. Sec. 11987, R. C. M. 1921, Cal. Pen. C. Sec. 1110.

Sufficiency of Evidence

Held, under this section, that where defendant was charged with obtaining money by a false pretense that he had credit at a certain bank and could borrow the money 'there, testified to by one witness only, there was a total failure of proof, in the absence of any false token or writing employed by the defendant or corroborating circumstances. State v. Brantingham, 66 M 1, 13, 212 P 499.

In the absence of evidence that the complaining witness parted with money in reliance on one of several alleged false representations, conviction was not justified on that count of the information. State v. Brantingham, 66 M 1, 13, 212 P 499.

Collateral References

False Pretenses \$32 (1). 35 C.J.S. False Pretenses §52. 32 Am. Jur. 2d, False Pretenses, p. 189, §17; p. 217 et seq., §68 et seq.

94-7220. (11988) Conviction on testimony of accomplice. A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of

the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

History: Ap. p. Sec. 316, p. 238, Cod. Stat. 1871; re-en. Sec. 316, 3d Div. Rev. Stat. 1879; re-en. Sec. 317, 3d Div. Comp. Stat. 1887; en. Sec. 2089, Pen. C. 1895; re-en. Sec. 9290, Rev. C. 1907; re-en. Sec. 11988, R. C. M. 1921. Cal. Pen. C. Sec. 11111.

Cross-Reference

Child under sixteen not an accomplice to commission of infamous crime against nature, sec. 94-4120.

Corroboration

In a legal sense corroboration is something which leads an impartial and reasonable mind to believe that material testimony is true; it may also consist of admissions, declarations or conduct of the defendant, writings, or other documentary evidence which tends to show concert of action between the accomplice and the defendant. State v. Harmon, 135 M 227, 340 P 2d 128; State v. Moran, 142 M 423, 384 P 2d 777.

Corroboration of Testimony of Accomplice Question for Court

Whether evidence corroborative of testimony of an accomplice tends to connect defendant with offense is question of law for court, but weight of evidence is matter for jury. State v. Yegen, 86 M 251, 254, 283 P 210.

Where state relies on testimony of accomplice, question whether evidence in corroboration of that given by the accomplice meets requirement of this section, that it must in itself, without aid of testimony of accomplice, tend to connect defendant with commission of offense charged, is one of law for court. State v. Jones, 95 M 317, 323, 26 P 2d 341.

Evidence corroborating testimony of an accomplice can be furnished by defendant and can be circumstantial. It need not extend to every fact to which the accomplice testified and need not be sufficient to justify a conviction or establish a prima facie case of guilt, it being sufficient if it tends to connect defendant with commission of the crime. Whether it tends to do so is a question of law, while its weight is a matter for the jury. State v. Donges, 126 M 341, 251 P 2d 254, 257.

Instructions

Where the defense requested instructions as to the effect of accomplice's testimony and there was evidence in the record from which the jury might have concluded that a deputy sheriff was an accomplice of the defendant, the court

should have instructed the jury that if they believed the deputy sheriff was an accomplice then they must weigh his evidence as provided by section 93-2001-1, subdivison 4 and also that such evidence must be corroborated as required by this section. State v. Porter, 125 M 503, 242 P 2d 984, 990.

One Accomplice Cannot Corroborate Another

One accomplice cannot supply the independent evidence necessary to corroborate another accomplice. State v. Bolton, 65 M 74, 85, 88, 212 P 504.

Operation and Effect

This section does not, unless by implication, require the production of evidence from independent sources with respect to the corpus delicti, the identity of the person killed or any other particular. State v. Calder, 23 M 504, 513, 59 P 903; State v. Stevenson, 26 M 332, 335, 67 P 1001.

In a larceny case, the testimony of an accomplice will not support a conviction unless corroborative. State v. McCarthy, 36 M 226, 235, 92 P 521.

Refusal of an offered instruction that a defendant could not be convicted upon the uncorroborated evidence of an accomplice unaccompanied by one as to what corroboration would take the case out of the rule or one defining what constitutes an accomplice, held not prejudicial error under the case as made. State v. Smith, 75 M 22, 27, 241 P 522.

The requirement of this section that the testimony of an accomplice must be corroborated by other evidence does not call for corroboration as to every fact to which the accomplice testifies or for evidence sufficient of itself to establish defendant's guilt. If, unaided by that of the accomplice, it tends to connect defendant with the commission of the crime it is sufficient; it need not be direct but may be circumstantial, and in determining its sufficiency all of the evidence, other than that of the accomplice, is to be considered, including that of defendant. State v. Broell, 87 M 284, 288, 294, 286 P 1108.

In a sodomy case, court should have given the requested instructions of the defendant to the effect that if the jury finds the prosecuting witness was an accomplice, then the jury must acquit the defendant, where the only evidence connecting the defendant with the commission of the crime was the testimony of the prosecuting witness. State v. Searle, 125 M 467, 239 P 2d 995, 998.

Person Making Forged Instrument Not Accomplice of Person Passing Forged Instrument

Testimony of person who forged endorsement on warrant and who was not implicated in matter of passing or uttering the instrument is corroborating evidence to testimony of accomplice of defendant charged with uttering forged instrument. Person who forged endorsement is not accomplice to defendant who uttered instrument as making of instrument and uttering of it are two separate crimes although they both constitute forgery. State v. Phillips, 127 M 381, 264 P 2d 1009, 1014. (See, however, the dissenting opinions in 127 M 381, 264 P 2d 1009, 1016, 1018.)

Sufficiency of Corroborative Evidence

Evidence held to be insufficient corroboration of an accomplice's testimony that he and accused, having been discovered stealing a cow by a white man, followed him, and killed him and his dog, placing the two bodies together, where the only identification of the locality is that it was on the same stream, the country being unsettled cattle country. State v. Spotted Hawk, 22 M 33, 57, 55 P 1026.

The corroboration of the testimony of an accomplice must be evidence from an independent source, and it must be such that this independent evidence in itself, without considering the testimony of the accomplice at all, tends to connect the defendant with the commission of the crime charged. It is not a satisfaction of the statute to corroborate an accomplice upon immaterial matters, nor to prove merely that the crime charged has been committed, or the circumstances under which it has been committed. State v. Geddes, 22 M 68, 83, 55 P 919; State v. Lawson, 44 M 488, 490, 120 P 808. See also State v. Stevenson, 26 M 332, 334, 67 P 1001.

It is not necessary that the evidence in corroboration of the accomplice must be of sufficient strength, when standing alone, to connect the defendant with the commission of the crime, or to establish his guilt; if it tends in and of itself alone to prove the defendant's connection, it is sufficient. State v. Calder, 23 M 504, 520, 59 P 903.

Corroborating evidence tending to establish, independently of the accomplice's statements, the commission of the offense and accused's connection therewith, is sufficient, though, if the accomplice's testimony was not considered, the corroborating evidence would be insufficient to convict. State v. Stevenson, 26 M 332, 334, 67 P 1001.

The testimony of an accomplice is sufficiently corroborated, where the evidence, independent of the testimony of the accomplice, has sufficient probative value to justify a submission to the jury for a finding as to the guilt of accused. State v. Biggs, 45 M 400, 406, 123 P 410.

It is not necessary that an accomplice should be corroborated upon every fact to which he testifies; nor is it necessary that the independent evidence should be sufficient of itself to establish defendant's guilt, or to connect him with the commission of the crime charged, but it is sufficient if it tends to do so. State v. Slothower, 56 M 230, 233, 182 P 270.

Evidence held sufficient to establish corroboration within the meaning of this section. State v. Slothower, 56 M 230, 233,

182 P 270.

To render evidence corroborative of that given by an accomplice sufficient to warrant conviction, the accomplice need not be corroborated upon every fact to which he testified, or that the independent evidence alone should be sufficient to bring about that result, or that it connects defendant with the commission of the offense, it being sufficient, if, unaided by that of the accomplice, it tends to connect with its perpetration. State v. Bolton, 65 M 74, 85, 212 P 504.

An accomplice need not be corroborated as to every material fact to which he testifies, nor is it necessary that the corroborative testimony be sufficient to make a prima facie case against the defendant. State v. Ritz, 65 M 180, 186, 211 P 298.

Evidence corroborative of that given by an accomplice need not be direct, but may be circumstantial, this section being satisfied if the independent evidence tends to connect the accused with the commission of the crime of which he is charged. State v. Ritz, 65 M 180, 186, 211 P 298.

The corroborating evidence without which a defendant cannot be convicted on the testimony of an accomplice, under this section, may be supplied by the defendant or his witnesses; may be circumstantial; need not extend to every fact to which the accomplice testifies; need not be sufficient to justify a conviction, or to establish a prima facie case of guilt, or to connect the defendant with the commission of the crime; it being sufficient if it tends to do so, and whether it tends to do so is a question of law, the weight of the evidence being a matter for the consideration of the jury. State v. Cobb, 76 M 89, 91, 245 P 265.

Evidence in a prosecution for the larceny of horses, corroborative of the testimony of two accomplices, examined and held sufficient as tending to connect defendant with the commission of the offense, and therefore sufficient to sustain his conviction under this section. State v. Cobb, 76 M 89, 91, 245 P 265.

To warrant conviction for crime on the testimony of an accomplice, within the rule established by this section, it is not necessary that he be corroborated as to every material fact to which he testifies, or that the corroborative evidence in itself be sufficient to establish a prima facie case or to justify conviction or connect defendant with the commission of the offense charged, but if it tends to connect him therewith it is sufficient; such evidence need not be direct but may be circumstantial; it may be supplied by the defendant or his witnesses. State v. Yegen, 86 M 251, 254, 283 P 210.

Evidence in a prosecution for the larceny of a horse in which the state relied largely upon the testimony of an admitted accomplice, examined and held sufficiently corroborative as tending to connect the accused with the commission of the ofense, independently of the testimony of the accomplice. State v. Yegen, 86 M 251, 254, 283 P 210.

The fact that defendant, charged with the larceny of livestock, had possession of and exercised dominion over the animals, to the extent of selling and receiving payment for them, unexplained and considered in the light of the surrounding circumstances, tended to connect him with the crime charged, under the above accomplice rule, regardless of whether or not the circumstances were sufficient, coupled with his possession and dominion, to warrant a conviction on a charge of larceny or of receiving stolen property. State v. Broell, 87 M 284, 288, 294, 286 P 1108.

In a prosecution for larceny of livestock in which appellant's convicted co-defendant was one of the state's witnesses, evidence corroborative of that of the accomplice held sufficient to satisfy the requirements of this section, relative to corroboration. State v. Ingersoll, 88 M 126, 292 P 250.

Evidence corroborative of that of an accomplice in a prosecution for grand larceny, to the effect that defendant near midnight carried the accomplice and one other in her car to a ranch where the latter two alighted, went to a barn, took four saddles, placed them in the back part of the car which defendant then drove to a place where the property was hidden—examined and held sufficient to meet the requirements of this section. State v. McComas, 89 M 187, 295 P 1011.

All the testimony adduced at a criminal trial, excluding that of the accomplice but including that of defendant, must be considered in determining the sufficiency of testimony said to corroborate that of the accomplice, except that where there are two or more accomplices no statement of one can supply corroboration for an-

other. State v. Jones, 95 M 317, 323, 26 P 2d 341.

The independent evidence required by this section for corroboration of that given by an accomplice need not be direct; it may be in whole or in part circumstantial. State v. Jones, 95 M 317, 323, 26 P 2d 341.

The law does not require that an accomplice be corroborated upon every fact testified to by him, or that the independent evidence mentioned in this section be sufficient to justify a conviction or connect defendant with the commission of the offense for which he is on trial; if it tends to connect him therewith or is such that culpability on defendant's part may be deduced therefrom, it is sufficient. State v. Jones, 95 M 317, 323, 26 P 2d 341.

Evidence in corroboration of that given by an accomplice which merely shows an opportunity on the part of defendant of having joined in the commission of an offense is insufficient, and where the facts and circumstances relied upon for corroboration are as consistent with innocence as with guilt, conviction on such evidence cannot stand. State v. Jones, 95 M 317, 323, 26 P 2d 341.

Evidence in a prosecution for robbery against one of three defendants, one of whom pleaded guilty, the second being convicted on a separate trial and upon whose testimony the state relied for conviction of appellant, reviewed, and held insufficient as corroborating that given by the accomplice, it showing no more than an opportunity on the part of defendant to have conspired to commit the crime and a suspicion that he did so, and having been as consistent with his innocence as with guilt. State v. Jones, 95 M 317, 323, 26 P 2d 341.

Under this section the accomplice need not be corroborated upon every fact to which he testified nor need the corroborating evidence be sufficient standing alone, to convict or absolutely connect the defendant with the crime, it being sufficient if the corroborative evidence tends to connect him with its perpetration. State v. Akers, 106 M 43, 51, 74 P 2d 1138.

Evidence in a prosecution for attempted arson against the owner of a dwelling house, who, according to accomplice's testimony, solicited him upon the promise to pay him ten per cent of the insurance money and furnished him with a diagram of the upper story where the attempt was made, the lower story being occupied, held sufficiently corroborated by other evidence tending to connect the defendant with commission of the crime under this section to warrant judgment of conviction. State v. Gaffney, 106 M 310, 313, 77 P 2d 398.

Testimony in a prosecution for the infamous crime against nature (sodomy)

claimed sufficiently corroborative of that of a boy accomplice in that it tended to connect the defendant with the commission of the offense, held insufficient as simply showing opportunity, suspicion, or that he and the boy were together in same room when arrested, or that he had made gifts to the boy, or the boy's nervous condition, etc., and therefore insufficient to warrant conviction. State v. Keckonen, 107 M 253, 261, 84 P 2d 341.

In a prosecution for an infamous crime against nature, where the only evidence other than the testimony of the accomplice showed that the accomplice had stayed at the defendant's house overnight and slept with the defendant, the corroborating evidence was not sufficient to sustain a conviction as it does nothing more than to show opportunity on the part of defendant to have committed the crime. State v. Gangner, 130 M 533, 305 P 2d 338.

Corroborating evidence need not be direct, but may be circumstantial; it need not be sufficient to justify a conviction, or to establish a prima facie case of guilt; it need not be sufficient to connect the defendant with the commission of the crime, but it is sufficient if it tends to do so. State v. Harmon, 135 M 227, 340 P 2d 128.

Evidence was sufficient to corroborate the testimony given by alleged accomplice where the record disclosed facts and circumstances which tended to connect the defendant with the commission of burglary in the first degree. State v. Laverdure, 140 M 236, 370 P 2d 489, 491; State v. Barick, 143 M 273, 389 P 2d 170.

"Tends to Connect"

To meet the requirement of this section that the testimony of an accomplice must tend to connect with the commission of the offense charged, testimony upon immaterial matters or such as raises a suspicion or conjecture is insufficient, but it must have a tendency to establish the state's case and not be equally consonant with a reasonable explanation pointing to innocent conduct on the part of defendant. State v. Keckonen, 107 M 253, 260, 84 P 2d 341.

Weight Given Corroborative Evidence

If the trial judge is satisfied that the evidence is corroborative, it is his duty to submit the case to the jury to determine what effect should be given to the corroboration and whether it is sufficient to warrant a conviction. State v. Harmon, 135 M 227, 340 P 2d 128.

Who Is an Accomplice

A person through whom a litigant attempted to corruptly influence a member

of a jury panel, and who, while declining to act as intermediary, stated that he would not say anything to anybody, but that he would have to tell the prospective trial juror, with whom he was connected in a business way, so as to put him on his guard, was not an accomplice whose testimony it was necessary to corroborate before the litigant could be found guilty of contempt. State ex rel. Webb v. District Court, 37 M 191, 199, 95 P 593.

To constitute a witness in a prosecution for larceny an accomplice, within the meaning of this section, he must have entertained a criminal intent common with that which moved the defendant to commit the crime with which he stood charged, or, not having been present at its commission, must have advised and encouraged it, and whether he did either was a question for the jury under appropriate instructions. State v. Slothower, 56 M 230, 232, 182 P 270.

The question whether a witness for the state is an accomplice of the defendant is, unless the fact is undisputed, for the jury under proper instructions, and where the evidence as to this fact or as to corroboration is doubtful or conflicting, the court should not invade its province by instructions. State v. Smith, 75 M 22, 27, 241

P 522.

To constitute a witness for the state an accomplice, he must have entertained a criminal intent common with that which moved the defendant to commit the crime with which he stands charged, or, not having been present at its commission, must have advised and encouraged it. State v. Keithley, 83 M 177, 181, 271 P 449.

If a witness for the state whose testimony is relied upon by it to convict the defendant on trial for crime could himself have been informed against for the offense, either as a principal, strictly speaking, or as accessory before the fact and as such made a principal by section 94-204, he is an accomplice whose uncorroborated testimony is insufficient to sustain conviction. State v. Keithley, 83 M 177, 181, 271 P 449.

To constitute a witness an accomplice he must have been guilty of complicity in the crime charged, either by being present and aiding in and abetting it, or by having advised and encouraged its commission, though absent at the time; he must have knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime, and the test whether or not he is an accomplice is: Would the facts justify his prosecution with the defendant on trial? State v. McComas, 85 M 428, 433, 278 P 993.

Contention of defendant dealer, in a prosecution for receiving stolen property that the thief was his accomplice and that therefore, under this section, his testimony required corroboration, held, not meritorious, since the theft was committed before the thief solicited the received to buy the cigarettes, and the defendant was not shown to have had any knowledge of the fact that the theft was to be committed. In general, the larcener is not the accomplice of the one who

knowingly receives stolen property. State v. Mercer, 114 M 142, 155, 133 P 2d 358.

Collateral References

Criminal Law 510, 511 (2), 741 (5), 742 (2).

23 C.J.S. Criminal Law §§ 809-812 (6). 29 Am. Jur. 2d 329 et seq., Evidence, § 1153 et seq.

94-7221 to 94-7233. (11989 to 12001) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-7221 to 94-7233 (Secs. 188, 192, 193, p. 246, Bannack Stat.; Secs. 309, 313, 314, 317, 321, 324, pp. 237 to 239, Cod. Stat. 1871; Secs. 2090 to 2102,

Pen. C. 1895; Sec. 1, Ch. 113, L. 1907; Sec. 1, Ch. 54, L. 1935), relating to trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1706, Title 95, ch. 19 and sec. 95-2403.

94-7234. (12002) Repealed—Chapter 228, Laws of 1969.

Repeal

Section 94-7234 (Sec. 2103, Pen. C. 1895), relating to conviction or acquittal

as bar to subsequent prosecution, was repealed by Sec. 6, Ch. 228, Laws 1969.

94-7235 to 94-7239. (12003 to 12007) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-7235 to 94-7239 (Secs. 116, 194, pp. 205, 246, Bannack Stat.; Secs. 2104 to 2108, Pen. C. 1895), relating to

trial, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1111, 95-1901, 95-1903, 95-1913, and 95-1915.

94-7240. (12008) Trials for larceny. Upon a trial for larceny of money, bank notes, certificates of stock, or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained if the offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable securities, although the particular species of coin or other money, or the number, denomination, or kind of bank notes, certificates of stock, or valuable security be not proved; and upon a trial for larceny, if the offender be proved to have stolen any piece of coin or other money, any bank note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank note, certificate of stock, or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

History: En. Sec. 2109, Pen. C. 1895; re-en. Sec. 9310, Rev. C. 1907; re-en. Sec. 12008, R. C. M. 1921. Cal Pen. C. Sec. 1131.

Larceny Included in Robbery

Larceny is included in the crime of robbery, and in a prosecution for robbery the allegation of the information describing the property is sustained if it be proved

that defendant has stolen any money or bank notes. State v. Rodgers, 21 M 143, 53 P 97.

Collateral References

Larceny \$58. 52A C.J.S. Larceny §132. 32 Am. Jur. 1031 et seq., Larceny, §119 et seq.

CHAPTER 73

CONDUCT OF JURY AFTER SUBMISSION OF CASE

Section 94-7301 to 94-7306. Repealed.

94-7307. When discharged without verdict, cause to be again tried. 94-7308. Repealed.

94-7301 to 94-7306. (12009 to 12014) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-7301 to 94-7306 (Secs. 323, 330, p. 239, Cod. Stat. 1871; Secs. 2120 to 2125, Pen. C. 1895; Sec. 1, Ch. 29, L.

1945), relating to conduct of jury after submission of case, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1913.

94-7307. (12015) When discharged without verdict, cause to be again tried. In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried.

History: En. Sec. 331, p. 240, Cod. Stat. 1871; re-en. Sec. 331, 3d Div. Rev. Stat. 1879; re-en. Sec. 332, 3d Div. Comp. Stat. 1887; amd. Sec. 2126, Pen. C. 1895; re-en. Sec. 9317, Rev. C. 1907; re-en. Sec. 12015, R. C. M. 1921. Cal. Pen. C. Sec. 1141.

Discharge of Accused Amounts to Acquittal

Defendant could not be tried again if he had been discharged during progress of trial, or after case had been submitted to jury, although the jury might have been discharged or prevented from giving a verdict by reason of an accident or other cause. Such a discharge of prisoner amounted to an acquittal, and brought him within purview of former statute prohibiting second prosecution for same offense, notwithstanding that there had been no judgment of acquittal. State v. Keerl, 33 M 501, 515, 85 P 862, affirmed in 213 US 135, 53 L Ed 734, 29 S Ct 469. It seems that where the defendant in a

criminal prosecution has been arraigned, and the trial has been begun upon a valid indictment or information, and he is discharged by a competent court before verdict, an acquittal results, and the plea of once in jeopardy will lie. State v. Keerl, 33 M 501, 515, 85 P 862, affirmed in 213 US 135, 53 L Ed 734, 29 S Ct 469.

Whenever jeopardy has occurred for the same offense, and has, without necessity or the procurement of the accused, ended by a discharge of the jury before verdict, the plea of once in jeopardy is available. State v. Gaimos, 53 M 118, 122, 162 P 596.

Collateral References

Criminal Law 182.

22 C.J.S. Criminal Law § 259. 21 Am. Jur. 2d 246 et seq., Criminal Law, § 194 et seq.

94-7308. (12016) Repealed—Chapter 196, Laws of 1967.

Repeal

Section 94-7308 (Sec. 332, p. 240, Cod. Stat. 1871), relating to adjourning of court during absence of jury, was repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1914.

CHAPTER 74

THE VERDICT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7401 to 94-7420. (12017 to 12036) Repealed.

Repeal

Sections 94-7401 to 94-7420 (Secs. 195 to 202, pp. 247, 248, Bannack Stat.; Secs. 333 to 335, 337, 341 to 347, pp. 240, 241, Cod. Stat. 1871; Secs. 2140 to 2159, Pen. C. 1895), relating to the verdict, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-506, 95-508, 95-1109, 95-1506, and Title 95, chs. 19 and 22.

CHAPTER 75

BILLS OF EXCEPTION

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7501 to 94-7508. (12037 to 12045) Repealed.

Repeal

Sections 94-7501 to 94-7508 (Secs. 2170, 2172 to 2175, Pen. C. 1895; Secs. 1, 2, Ch.

34, L. 1903; Secs. 15, 16, Ch. 225, L. 1921), relating to bills of exception, were repealed by Sec. 2, Ch. 196, Laws 1967.

CHAPTER 76

NEW TRIALS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7601 to 94-7605. (12046 to 12050) Repealed.

Repeal

Sections 94-7601 to 94-7605 (Secs. 352, 353, p. 242, Cod. Stat. 1871; Sec. 1, p. 43, L. 1881; Secs. 2190 to 2194, Pen. C. 1895;

Sec. 17, Ch. 225, L. 1921; Sec. 1, Ch. 150, L. 1931), relating to new trials, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-2101.

CHAPTER 77

ARREST OF JUDGMENT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-7701 to 94-7704. (12051 to 12054) Repealed.

Repeal

Sections 94-7701 to 94-7704 (Secs. 238 to 240, p. 253, Bannack Stat.; Secs. 2200

to 2203, Pen. C. 1895), relating to arrest of judgment, were repealed by Sec. 2, Ch. 196, Laws 1967.

CHAPTER 78

JUDGMENT—SUSPENSION OF SENTENCE AND PROBATION

(Repealed-Section 4, Chapter 194, Laws of 1955; Section 2, Chapter 196, Laws of 1967)

94-7801 to 94-7841. (12055 to 12074, 12078 to 12086) Repealed.

Repeal

Sections 94-7801 to 94-7841 (Secs. 208, 210 to 212, p. 249, Bannack Stat.; Secs. 360, 362, 365 to 367, 389, 390, pp. 244, 245, 248, Cod. Stat. 1871; Sec. 1, pp. 32, 33, L. 1883; Secs. 2210 to 2229, Pen. C. 1895; Secs. 1 to 9, Ch. 21, L. 1913; Sec. 18, Ch. 225, L. 1921; Sec. 1, Ch. 53, L. 1935; Sec. 1, Ch. 184, L. 1937; Sec. 1, Ch. 40, L. 1939;

Sec. 1, Ch. 65, L. 1953; Secs. 1 to 3, 5 to 7, 9, Ch. 194, L. 1955; Secs. 1 to 7, Ch. 249, L. 1959), relating to judgment, suspension of sentence and probation, were repealed by Sec. 4, Ch. 194, Laws 1955; Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-202, Title 95, ch. 6, secs. 95-1107, 95-1123, 95-1904, Title 95, chs. 21 and 22, and secs. 95-2302, and 95-2305.

CHAPTER 79

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

Section 94-7901. Governor may make interstate compact for control of crime—conditions.
94-7902. Act, how cited.

94-7901. Governor may make interstate compact for control of crime—conditions. The governor of this state is hereby authorized and directed to enter into a compact on behalf of the state of Montana with any of the United States legally joining therein in the form substantially as follows:

A COMPACT. Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

- (1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact, (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact, (herein called "receiving state") while on probation or parole, if
- (a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there,
- (b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

- (2) That each receiving state will assume the duties of visitation and of supervision over the probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.
- (3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formality will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

- (4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.
- That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.
- That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.
- That this compact shall continue in force and remain binding upon each ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

History: En. Sec. 1, Ch. 189, L. 1937.

Return of Parolee without Extradition

Parolee's rights under United States constitution were not violated when parolee was returned to state from Oregon for parole violations without resort to extradition and, even if constitutional right was involved, it was waived by parolee's agreement with state wherein, as condition of parole, he waived certain rights. In re Petition of Dixson, 149 M 412, 430 P 2d 642.

Collateral References

States \$\infty\$6.

81 C.J.S. States § 10. 49 Am. Jur. 232, States, Territories, and Dependencies, § 11.

94-7902. Act, how cited. This act may be cited as the Uniform Act for Out-of-State Parolee Supervision.

History: En. Sec. 4, Ch. 189, L. 1937.

CHAPTER 80

THE EXECUTION

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8001 to 94-8023. (12087 to 12104) Repealed.

Sections 94-8001 to 94-8023 (Secs. 218 to 220, 222, 224 to 232, pp. 250 to 252, Bannack Stat.; Sec. 1, p. 56, L. 1885; Secs. 2240 to 2257, Pen. C. 1895; Sec. 1, Ch.

125, L. 1941; Secs. 1 to 5, Ch. 236, L. 1959; Secs. 98 to 100, Ch. 199, L. 1965), relating to execution of judgment, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2301 to 95-2312.

CHAPTER 81

APPEALS TO SUPREME COURT—WHEN ALLOWED—HOW TAKEN-EFFECT THEREOF

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-8101 to 94-8114. (12105 to 12118) Repealed.

Repeal

Sections 94-8101 to 94-8114 (Secs. 242, 246, 247, 250, 251, pp. 253, 254, Bannack Stat.; Secs. 2270 to 2283, Pen. C. 1895; Sec. 1, Ch. 42, L. 1935), relating to appeals to the supreme court, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2403 to 95-2407, 95-2424, and 95-2429.

CHAPTER 82

DISMISSING APPEALS FOR IRREGULARITY—ARGUMENT ON APPEAL—JUDGMENT ON APPEAL

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8201 to 94-8215. (12119 to 12132) Repealed.

Repeal

Sections 94-8201 to 94-8215 (Secs. 254 to 256, p. 255, Bannack Stat.; Secs. 403, 405 to 407, p. 250, Cod. Stat. 1871; Secs. 2300 to 2302, 2310 to 2312, 2320 to 2327, Pen. C. 1895; Sec. 1, Ch. 136, L. 1931),

relating to dismissing of appeals for irregularity and argument and judgment on appeal, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1904, 95-2403, 95-2411, 95-2421, 95-2425 to 95-2427, and 95-2430.

CHAPTER 83

IN WHAT CASES DEFENDANT MAY BE ADMITTED TO BAIL

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8301 to 94-8307. (12133 to 12139) Repealed.

Sections 94-8301 to 94-8307 (Secs. 112 to 238, 240 to 243, pp. 207 to 227, Cod. Stat. 1871), relating to bail and cases in

which defendant may be admitted to bail, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1108, 95-1109, 95-1111, 95-1118, and 95-1123.

CHAPTER 84

BAIL ON BEING HELD TO ANSWER BEFORE INFORMATION

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8401 to 94-8405. (12140 to 12144) Repealed.

Repeal

Sections 94-8401 to 94-8405 (Secs. 239, 244 to 246, pp. 227, 228, Cod. Stat. 1871; Secs. 2350 to 2354, Pen. C. 1895), relating to bail on being held to answer upon an

examination for a public offense, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1102, 95-1113, 95-1114 and 95-1123.

CHAPTER 85

BAIL ON INDICTMENT OR INFORMATION BEFORE CONVICTION

Section 94-8501 to 94-8507. Repealed. 94-8508. Sureties for guaranteed arrest bond certificates—filing of undertaking-guaranteed arrest bond certificate.

Violations of motor vehicle laws-posting of guaranteed arrest bond 94-8509. certificate in lieu of cash.

94-8510. Certification of names of sureties—withdrawal by surety company.

94-8501 to 94-8507. (12145 to 12151) Repealed—Chapter 196, Laws of 1967.

Repeal

Sections 94-8501 to 94-8507 (Secs. 2360 to 2366, Pen. C. 1895), relating to bail on being held to answer before information,

were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-602, 95-1102 to 95-1104, 95-1111, and 95-1123.

- 94-8508. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate. (A) Any domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not to exceed one hundred dollars (\$100.00) with respect to any guaranteed arrest bond certificates issued in such year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state, by filing with the commissioner of insurance an undertaking thus to become surety.
- (B) Such undertaking shall be in form to be prescribed by the commissioner and shall state the following:
- (1) The name and address of the automobile club or clubs, automobile association, or insurance company or companies, or associations with respect to the guaranteed arrest bond certificates of which the surety company undertakes to be surety.
- (2) The unqualified obligation of the surety company to pay the fine or forfeiture in an amount not to exceed one hundred dollars (\$100.00) of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.
- (C) The term, guaranteed arrest bond certificate, means any printed card or other certificate issued by an automobile club, association or insurance company, to any of its members or insureds, which said card or certificate is signed by such member or insured and contains a printed statement that such automobile club, association or insurance company and a surety company, or an insurance company authorized to transact both automobile liability insurance and surety business in the state of Montana, guarantee the appearance of the person whose signature appears on the card or certificate and that they will, in the event of failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed one hundred dollars (\$100.00).

History: En. Sec. 1, Ch. 39, L. 1957.

Cross-Reference

Sureties for guaranteed arrest bond certificates, filing of undertaking, definition of guaranteed arrest bond certificate, sec. 95-1121.

94-8509. Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash. Any guaranteed arrest bond certificate with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business

within this state, as provided in section 94-8508 hereof, shall, when posted by the person whose signature appears thereon, be accepted in lieu of cash bail in an amount not to exceed one hundred dollars (\$100.00), as a bail bond to guarantee the appearance of such person, in any court, including municipal courts, in this state, at such time as may be required by the court, when such person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on such guaranteed arrest bond certificate so posted as a bail bond in any court in this state shall be subject to the forfeiture and enforcement provisions with respect to bail bonds posted in criminal cases as provided by law, and that any such guaranteed arrest bond certificate posted as bail bond in any municipal court in this state shall be subject to the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted.

History: En. Sec. 2, Ch. 39, L. 1957.

Cross-Reference

Violations of motor vehicle laws, posting of guaranteed arrest bond certificates in lieu of cash, sec. 95-1122.

94-8510. Certification of names of sureties—withdrawal by surety company. The commissioner of insurance shall certify to each justice of the peace, police magistrate and district judge the names of surety companies who have become sureties with respect to guaranteed arrest bond certificates, and shall likewise immediately notify such official upon the withdrawal of such company as surety. No such withdrawal by any company shall be effective for thirty (30) days after the filing thereof with the state insurance commissioner.

History: En. Sec. 3, Ch. 39, L. 1957.

Cross-Reference

Certification of names of sureties, with-drawal by surety company, sec. 95-1123.

CHAPTER 86

BAIL ON APPEAL—DEPOSIT IN LIEU OF BAIL

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8601 to 94-8605. (12152 to 12156) Repealed.

Repeal

Sections 94-8601 to 94-8605 (Sec. 118, p. 235, Bannack Stat.; Secs. 2370, 2371, 2380 to 2382, Pen. C. 1895), relating to

bail on appeal and deposit in lieu of bail, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-1102, 95-1112, 95-1123.

CHAPTER 87

SURRENDER OF DEFENDANT—FORFEITURE OF BAIL—RECOMMITMENT OF DEFENDANT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8701 to 94-8718. (12157 to 12174) Repealed.

Repeal

Sections 94-8701 to 94-8718 (Sec. 124, p. 236, Bannack Stat.; Secs. 263 to 268, p. 230, Cod. Stat. 1871; Sec. 1, p. 45, L. 1873; Secs. 2390 to 2392, 2400 to 2406, 2420 to 2427, Pen. C. 1895; Sec. 1, Ch. 181, L.

1965), relating to surrender of bailed defendant, forfeiture of bail and recommitment, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-1102, 95-1107, 95-1115 to 95-1117, and 95-1123.

CHAPTER 88

WHO MAY BE WITNESSES IN CRIMINAL ACTIONS

Section 94-8801. Who are competent witnesses.

94-8802. Competency of husband and wife as witnesses.

94-8803. When the defendant is not a competent witness and when he may

testify.

94-8804. Testimony of several persons concerned in commission of offense—privilege and immunity.

94-8801. (12175) Who are competent witnesses. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code.

History: En. Sec. 2440, Pen. C. 1895; re-en. Sec. 9482, Rev. C. 1907; re-en. Sec. 12175, R. C. M. 1921, Cal. Pen. C. Sec. 1321.

Operation and Effect

A boy fifteen years of age, called as a witness, who answers that he understood what he had done when he took the oath, that he knows the difference between truth and falsehood, that the truth was that which was so, and not that which was not so, and that he knew that if he did not tell the truth he would be punished, sufficiently qualifies himself to testi-

fy in a criminal case. State v. Cadotte, 17 M 315, 316, 42 P 857.

Collateral References

Witnesses \$35. 97 C.J.S. Witnesses \$51. 58 Am. Jur., Witnesses, \$\$102-213.

Promise of immunity or leniency as affecting one's competence as witness in criminal case. 120 ALR 751.

Mental condition as affecting competency of witness, 148 ALR 1140.

Judge as a witness in a cause on trial before him, 157 ALR 315.

94-8802. (12176) Competency of husband and wife as witnesses. Except with the consent of both, or in cases of criminal violence upon one by the other, or in case of abandonment, or neglect of children by either party, or of abandonment or neglect of the wife by the husband, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

History: En. Sec. 2441, Pen. C. 1895; re-en. Sec. 9483, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1915; re-en. Sec, 12176, R. C. M. 1921. Cal. Pen. C. Sec. 1322.

Evidence Other Than Communications

Statute applies to communications only with result that testimony of deputy sheriff that wife of defendant accompanied him to area where evidence which served to convict defendant was recovered should have been allowed. State v. Houchin, 149 M 503, 428 P 2d 971.

Operation and Effect

Under this section, as amended, a wife was competent to testify in a prosecution against her husband for attempted murder. State v. Rains, 53 M 424, 164 P 540.

It was error to permit wife to testify against husband in trial for assault where no offense against the wife was charged. State v. Storm, 124 M 102, 220 P 2d 674, 675.

Collateral References

Witnesses ≈ 52 (7), 61 (2), 62. 97 C.J.S. Witnesses § 75 et seq. 58 Am. Jur., Witnesses, § 175 et seq.

Competency or privilege of one spouse as a witness in a prosecution against other for an offense committed before marriage. 76 ALR 1088.

Change in common law disqualifying

spouse as witness. 93 ALR 1144.

Husband or wife as competent witness to transaction with deceased person with reference to disposal of policy. 122 ALR 1302.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution. 11 ALR 2d 646.

Polygamy by one spouse as crime against other spouse within statute as to competency as witness against other. 11 ALR 2d 669.

(12177) When the defendant is not a competent witness and 94-8803. when he may testify. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn, and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the

History: En. Sec. 15, p. 271, Cod. Stat. 1871; re-en. Sec. 15, 4th Div. Rev. Stat. 1879; re-en. Sec. 15, 4th Div. Comp. Stat. 1887; amd. Sec. 2442, Pen. C. 1895; re-en. Sec. 9484, Rev. C. 1907; re-en. Sec. 12177, R. C. M. 1921. Cal. Pen. C. Sec. 1323.

Credibility Instruction

In prosecution for second-degree assault, court did not err in giving general instruction which prescribed standard by which jury might judge defendant's credibility. State v. Manning, 149 M 517, 429 P 2d 625.

Defendant Who Testifies in Own Behalf Waives His Right

Where defendant in a criminal prosecution takes the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he waives his constitutional privilege, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses. State v. Smith, 57 M 349, 188 P 644.

Instruction on Section

An instruction, submitted to the jury in a criminal case, embodying the provisions of this section, was not open to the objection that it practically deprived accused of the presumption of innocence which attends him until his guilt is established beyond a reasonable doubt. State v. Farn-ham, 35 M 375, 379, 89 P 728.

While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, this section makes an exception to the rule, and the court may properly instruct that the jury,

in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged. State v. De Lea, 36 M

531, 541, 93 P 814. Where defendant did not testify in his own behalf, an instruction in the words of this section that if defendant does testify. the jury, in judging of the credibility and weight of his testimony, may take into consideration the fact that he is the defendant and the nature and enormity of the crime, though unnecessary, was harmless. State v. Stevens, 60 M 390, 405, 199 P 256; State v. Kessler, 74 M 166, 167, 239 P 1000.

"Must" for "May" in Instruction Not Erroneous

An instruction on section, using the word "must" in place of the statutory word "may," was not prejudicially erroneous. State v. Dotson, 26 M 305, 311, 67 P 938.

Not Applicable to Disbarment Proceedings

A disbarment proceeding is not a criminal prosecution, but a special proceeding of a civil nature, and the court is not therefore precluded under this section from taking into consideration the accused's failure to be sworn in his own behalf. In re Wellcome, 23 M 450, 468, 59 P 445.

Privilege against Self-Incrimination

In a prosecution for grand larceny, an instruction which had the effect of placing a burden on the defendant to explain his possession of stolen property was erroneous. Such a burden deprives defendant of his cloak of innocence and forces him to testify. The cases of State v. Sparks, 40 M 82, 105 P 87 and State v. Willette, 46 M 326, 127 P 1013, to the extent they impose a burden to explain or testify concerning any charge of possessing stolen goods are overruled. State v. Greeno, 135 M 580, 342 P 2d 1052.

Right To Remain Silent

Instruction that mere unexplained possession of stolen property was not suffi-cient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove effect of that

fact as circumstance to be considered with other evidence pointing to guilt did not deprive defendant of his right to remain silent. State v. Gray, - M -, 447 P 2d 475.

Collateral References

Criminal Law@393, 721 (1); Witnesses

© 88, 300, 337.

22A C.J.S. Criminal Law § 648; 23A
C.J.S. Criminal Law § 1098; 97 C.J.S.
Witnesses §§ 120, 121; 98 C.J.S. Witnesses §§ 494, 543.

21 Am. Jur. 2d 378 et seq., Criminal Law, § 349 et seq.; 30 Am. Jur. 2d 291 et seq., Evidence, § 1124 et seq.

94-8804. (12178) Testimony of several persons concerned in commission of offense—privilege and immunity. When two or more persons are jointly, or otherwise, concerned in the commission of an offense, any one of such persons may testify for or against the other in relation to the offense committed, but the testimony of such witness must not be used against him in any criminal action or proceeding.

History: En. Sec. 14, p. 271, Cod. Stat. 1871; re-en. Sec. 14, 4th Div. Rev. Stat. 1879; re-en. Sec. 14, 4th Div. Comp. Stat. 1887; amd. Sec. 2443, Pen. C. 1895; re-en. Sec. 9485, Rev. C. 1907; re-en. Sec. 12178, R. C. M. 1921.

Competency of Accomplice

An accomplice is a competent witness against an accused, although his testimony was obtained by threats or inducements. Such facts bear upon his credibility only, and not upon his competency, and his testimony is not subject to the rules governing admissions by a prisoner accused and on trial. Very great latitude should be allowed in the cross-examination of an accomplice. State v. Geddes, 22 M 68, 89, 55 P 919.

Operation and Effect

Testimony of witness who had previously pleaded guilty to charges on which defendant was being tried and who claimed immunity under statute was admissible at defendant's trial even though witness had refused to answer questions on deposition prior to trial on the ground that his answers then might have tended to incriminate him. State v. Corliss, 150 M 40, 430 P 2d 632.

Testimony of Accomplice

An accomplice may testify in a criminal case even though he is a convicted felon at the time of his testimony. State v. Barrick, 143 M 273, 389 P 2d 170.

Collateral References

Criminal Law 508 (1). 23 C.J.S. Criminal Law § 786 (1) et seq.

CHAPTER 89

COMPELLING ATTENDANCE OF WITNESSES-SUBPOENAS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-8901 to 94-8909. (4945, 12179 to 12186) Repealed.

Sections 94-8901 to 94-8909 (Sec. 4656, Pol. C. 1895; Secs. 2460 to 2467, Pen. C. 1895), relating to compelling witnesses' attendance and to subpoenas, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see sec. 95-1801.

CHAPTER 90

WITNESSES FROM WITHOUT STATE—HOW SECURED IN CRIMINAL PROCEEDINGS

Section 94-9001. "Witness" and "state" defined.

94-9002. Summoning witness in this state to testify in another state. 94-9003. Witness from another state summoned to testify in this state.

94-9004. Exemption from arrest and service of process.

94-9005. Uniformity of interpretation.

94-9006. Short title.

94-9007. Inconsistent laws repealed.

94-9001. "Witness" and "state" defined. Witness—as used in this act shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word state shall include any territory of the United States and District of Columbia.

History: En. Sec. 1, Ch. 188, L. 1937.

NOTE.—Uniform State Law. Sections 94-9001 through 94-9007 constitute the "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings" approved by the National Conference of Commissioners on Uniform State Laws in 1936 and adopted in the states of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico,

New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and also Puerto Rico and the Virgin Islands.

Cross-Reference

Production and suppression of evidence, Title 95, ch. 18.

Collateral References

Witnesses €= 6.

97 C.J.S. Witnesses § 1.

58 Am. Jur. 28, Witnesses, § 12.

94-9002. Summoning witness in this state to testify in another state.

- (1) If a judge of a court of record in any state, which, by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
- (2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution, or a grand jury investigation, in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced

or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

- (3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.
- (4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents (10c) a mile for each mile and five dollars (\$5.00) for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: En. Sec. 2, Ch. 188, L. 1937. Collateral References
Witnesses 5.
97 C.J.S. Witnesses \$ 17.

94-9003. Witness from another state summoned to testify in this state. (1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation, which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate will be presented to a judge of a court of record in the county in which the witness is found.

- (2) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which such determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.
- (3) If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten cents (10ϕ) a mile for each mile and five dollars (\$5.00) for each day that he is required to travel and attend as a witness, provided further that in those cases in which the state wherein the witness is found has by statutory enactment required that the summoned witness be paid an amount or amounts in excess of the amount hereinbefore in this paragraph provided, then said witness may be tendered said amount

or amounts so required by said state to be tendered though the said amount or amounts so required to be tendered are in excess of the said amounts in this paragraph provided for. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: En. Sec. 3, Ch. 188, L. 1937; amd. Sec. 1, Ch. 117, L. 1949.

94-9004. Exemption from arrest and service of process. If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not, while in this state pursuant to such summons or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons or order to attend and testify in that state or while returning therefrom he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons or order.

History: En. Sec. 4, Ch. 188, L. 1937.

Collateral References

Arrest 9, 60; Process 120. 6 C.J.S. Arrest §§ 3, 29; 72 C.J.S. Process § 80.

5 Am. Jur. 2d 781 et seq., Arrest, § 95 et seq.; 42 Am. Jur. 123, Process, § 142.

Waiver of privilege against or nonliability to arrest in civil action. 8 ALR 754.

Nonresident requested or required to re-

main in state pending investigation of accident. 59 ALR 51.

Public policy as ground for exemption of parties and witnesses from service of civil process. 85 ALR 1341.

94-9005. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

History: En. Sec. 5, Ch. 188, L. 1937.

94-9006. Short title. This act may be cited as "Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases."

History: En. Sec. 6, Ch. 188, L. 1937.

94-9007. Inconsistent laws repealed. All acts or parts of acts inconsistent with this act are hereby repealed.

History: En. Sec. 7, Ch. 188, L. 1937.

CHAPTER 91

EXAMINATION OF WITNESSES CONDITIONALLY

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-9101 to 94-9112. (12187 to 12198) Repealed.

Repeal

Sections 94-9101 to 94-9112 (Secs. 2480 to 2491, Pen. C. 1895; Sec. 1, Ch. 109, L. 1907), relating to examination of wit-

nesses conditionally, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1802.

CHAPTER 92

EXAMINATION OF WITNESSES ON COMMISSION

Section 94-9201. Examination of witness residing out of the state. 94-9202. When defendant may apply for an order to examine. 94-9203. Commission defined. 94-9204. Application made on affidavit.
94-9205. Application, to whom made.
94-9206. Order for commission, when granted, stay of proceedings.
94-9207. Interrogatories, how settled and allowed. 94-9208. Direction as to the return of the commission. 94-9209. Commission, how executed. 94-9210. Returned commission, delivery to an agent. 94-9211. Agent unable to deliver. 94-9212. When and how filed.

94-9213. Commission and return, open for inspection-copies, etc.

94-9214. Depositions to be read in evidence—objections.

94-9201. (12199) Examination of witness residing out of the state. When an issue of fact is joined upon an indictment or information, the defendant may have any material witness residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise.

History: En. Sec. 2500, Pen. C. 1895; re-en. Sec. 9506, Rev. C. 1907; re-en. Sec. 12199, R. C. M. 1921. Cal. Pen. C. Sec. 1349.

Cross-Reference

Production and suppression of evidence, Title 95, ch. 18.

Collateral References

Depositions 12. 26A C.J.S. Depositions §§ 6, 10.

(12200) When defendant may apply for an order to examine. When a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission.

History: En. Sec. 2501, Pen. C. 1895; re-en. Sec. 9507, Rev. C. 1907; re-en. Sec. 12200, R. C. M. 1921. Cal. Pen. C. Sec. 1350.

Collateral References Depositions 16.

26A C.J.S. Depositions § 7.

94-9203. (12201) Commission defined. A commission is a process issued under seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission.

History: En. Sec. 2502, Pen. C. 1895; re-en. Sec. 9508, Rev. C. 1907; re-en. Sec. 12201, R. C. M. 1921, Cal. Pen. C. Sec. 1351.

Collateral References

Depositions 24.

26A C.J.S. Depositions § 42.

94-9204. (12202) Application made on affidavit. The application must be made upon affidavit stating—

1. The nature of the offense charged:

- 2. The state of the proceedings in the action, and that an issue of fact has been joined therein;
- 3. The name of the witness, and that his testimony is material to the defense of the action:
 - 4. That the witness resides out of the state.

History: En. Sec. 2503, Pen. C. 1895; re-en. Sec. 9509, Rev. C. 1907; re-en. Sec. 12202, R. C. M. 1921. Cal. Pen. C. Sec. 1352.

Collateral References

Depositions 36. 26A C.J.S. Depositions §§ 30, 34.

94-9205. (12203) Application, to whom made. The application may be made to the court or a judge thereof, and must be upon three days' notice to the county attorney.

History: En. Sec. 2504, Pen. C. 1895; re-en. Sec. 9510, Rev. C. 1907; re-en. Sec. 12203, R. C. M. 1921. Cal. Pen. C. Sec. 1353.

Collateral References

Depositions 35. 26A C.J.S. Depositions §§ 35, 40.

94-9206. (12204) Order for commission, when granted, stay of proceedings. If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the court may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

History: En. Sec. 2505, Pen. C. 1895; re-en. Sec. 9511, Rev. C. 1907; re-en. Sec. 12204, R. C. M. 1921. Cal. Pen. C. Sec. 1354.

Collateral References

Depositions 38. 26A C.J.S. Depositions §§ 30, 41.

94-9207. (12205) Interrogatories, how settled and allowed. When the commission is ordered, the defendant must serve upon the county attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The county attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must endorse upon them his allowance and annex them to the commission.

History: En. Sec. 2506, Pen. C. 1895; re-en. Sec. 9512, Rev. C. 1907; re-en. Sec. 12205, R. C. M. 1921. Cal. Pen. C. Sec. 1355.

Collateral References

Depositions \$46. 26A C.J.S. Depositions §§ 49, 50.

94-9208. (12206) Direction as to the return of the commission. Unless the parties otherwise consent, by an endorsement upon the commission, the court or judge must endorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept.

History: En. Sec. 2507, Pen. C. 1895; re-en. Sec. 9513, Rev. C. 1907; re-en. Sec. 12206, R. C. M. 1921. Cal. Pen. C. Sec. 1356

Collateral References
Depositions©=73.
26Å C.J.S. Depositions §§ 73, 74.

94-9209. (12207) Commission, how executed. The commissioner, unless otherwise specially directed, may execute the commission as follows:

- 1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth.
- 2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.
- 3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.
- 4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.
- 5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.
- 6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the endorsement thereon.
- 7. If there be a direction on the commission to return it by mail the commissioner must immediately deposit it in the nearest post office. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction. A copy of this section must be annexed to the commission.

History: En. Sec. 2508, Pen. C. 1895; re-en. Sec. 9514, Rev. C. 1907; re-en. Sec. 12207, R. C. M. 1921. Cal. Pen. C. Sec. 1357.

Collateral References
Depositions 60.
26A C.J.S. Depositions § 58.

94-9210. (12208) Returned commission, delivery to an agent. If the commission and return be delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it.

History: En. Sec. 2509, Pen. C. 1895; re-en. Sec. 9515, Rev. C. 1907; re-en. Sec. 12208, R. C. M. 1921, Cal. Pen. C. Sec. 1358.

Collateral References
Depositions 78.
26A C.J.S. Depositions § 79.

94-9211. (12209) Agent unable to deliver. If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner.

History: En. Sec. 2510, Pen. C. 1895; 12209, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9516, Rev. C. 1907; re-en. Sec. 1359.

94-9212. (12210) When and how filed. The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending or information filed. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the post office, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge.

History: En. Sec. 2511, Pen. C. 1895; re-en. Sec. 9517, Rev. C. 1907; re-en. Sec. 12210, R. C. M. 1921. Cal. Pen. C. Sec. 1360.

Collateral References
Depositions©79.
26A C.J.S. Depositions § 80.

94-9213. (12211) Commission and return, open for inspection—copies, etc. The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or any part thereof, on payment of his fees.

History: En. Sec. 2512, Pen. C. 1895; re-en. Sec. 9518, Rev. C. 1907; re-en. Sec. 12211, R. C. M. 1921. Cal. Pen. C. Sec. 1361.

Collateral References
Depositions \$\simega 80.
26A C.J.S. Depositions \{\}81, 82.

94-9214. (12212) Depositions to be read in evidence—objections. The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court.

History: En. Sec. 2513, Pen. C. 1895; re-en. Sec. 9519, Rev. C. 1907; re-en. Sec. 12212, R. C. M. 1921. Cal. Pen. C. Sec. 1362.

Collateral References
Depositions \$88.
26A C.J.S. Depositions § 89.

CHAPTER 93

PROCEEDINGS ON INQUIRY AS TO SANITY OF A DEFENDANT

Section 94-9301 to 94-9306. Repealed. 94-9307. Expense of sending, etc., defendant to asylum.

94-9301 to 94-9306. (12213 to 12218) Repealed—Chapter 196, Laws of 1967.

Repeal proceedings, were repealed by Sec. 2, Ch. Sections 94-9301 to 94-9306 (Secs. 2520 to 2525, Pen. C. 1895), relating to sanity 95-504 to 95-507, and 95-1116.

94-9307. (12219) Expense of sending, etc., defendant to asylum. The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or the information filed; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere.

History: En. Sec. 2526, Pen. C. 1895; re-en. Sec. 9526, Rev. C. 1907; re-en. Sec. 12219, R. C. M. 1921. Cal. Pen. C. Sec. 1373.

Collateral References

Mental Health 571. 44 C.J.S. Insane Persons §§ 61, 75. 41 Am. Jur. 2d 593 et seq., Incompetent Persons, § 55 et seq.

CHAPTER 94

COMPROMISING OFFENSES BY LEAVE OF COURT

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-9401 to 94-9403. (12220 to 12222) Repealed.

Repeal

Sections 94-9401 to 94-9403 (Secs. 2540 to 2542, Pen. C. 1895), relating to com-

promise of offenses by leave of court, were repealed by Sec. 2, Ch. 196, Laws 1967.

CHAPTER 95

DISMISSAL OF ACTIONS FOR WANT OF PROSECUTION OR OTHER REASONS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-9501 to 94-9507. (12223 to 12229) Repealed.

Sections 94-9501 to 94-9507 (Sec. 179, 244, Bannack Stat.; Secs. 2550 to 2556, Pen. C. 1895), relating to dismissal

of prosecutions, were repealed by Sec. 2, Ch. 196, Laws 1967. For present law, see secs. 95-602, 95-1102, 95-1303, 95-1703, 95-1706, and 95-1708.

CHAPTER 96

PROCEEDINGS AGAINST CORPORATIONS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-9601 to 94-9610. (12230 to 12239) Repealed.

Repeal

Sections 94-9601 to 94-9610 (Secs. 470, 471, 3d Div. Comp. Stat. 1887; Secs. 2570 to 2579, Pen. C. 1895), relating to pro-

ceedings against corporations, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-615.

CHAPTER 97

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-9701 to 94-9707. (12240 to 12246) Repealed.

Repeal

posal of property stolen or embezzled, were repealed by Sec. 2, Ch. 196, Laws Sections 94-9701 to 94-9707 (Secs. 2610 to 2616, Pen. C. 1895), relating to dis-1967.

CHAPTER 98

PROBATION, PAROLE AND CLEMENCY

Section 94-9801 to 94-9820. Repealed. 94-9821. Act, how cited. 94-9822. Board of pardons-organization. 94-9823. Definitions. 94-9824. Seal, orders, records, report. 94-9825. Director and employees—salaries to be paid monthly—approval and auditing. 94-9826. Expenses to be paid. 94-9827. Legal adviser of the board. 94-9828. Duties of the director. 94-9829. Duties of probation and parole officers. 94-9830. Conditions of probation or suspension of sentence. 94-9831. Arrest—subsequent disposition. 94-9832. Parole authority and procedure. 94-9833. Conditional release. 94-9834. Information from prison officials. 94-9835. Persons may be heard—counsel. 94-9836. Subpoenas. 94-9837. Rules. 94-9838. Return of parole violator. 94-9839. Service of term for additional crime. 94-9840. Discharge of prisoner, parolee or conditional releasee. 94-9841. Cases of executive elemency. 94-9842. Notice of hearing applications for executive elemency. 94-9843. Publication of order. 94-9844. Proof of publication. 94-9845. Record of meeting, what to contain. 94-9846. When publication not necessary, 94-9847. Decision to be made. 94-9848. Governor may respite. 94-9849. Governor to report to legislative assembly.

94-9801 to 94-9820. (12247 to 12266) Repealed—Chapter 153, Laws of 1955.

94-9851. Effective date-application to persons presently on parole or proba-

Repeal

Sections 94-9801 to 94-9820 (Secs. 2630 to 2646, Pen. C. 1895; Secs. 3 to 6, 8 to 12, p. 192, L. 1891; and Secs. 1 to 3, Ch. 95,

94-9850. Cases of juveniles excluded.

tion or eligible for.

L. 1907), relating to pardons and paroles, were repealed by Sec. 31, Ch. 153, Laws 1955. For new provisions, see secs. 94-9821 to 94-9851.

94-9821. Act, how cited. This act shall be known and may be cited as the "Probation, Parole and Executive Clemency Act."

History: En. Sec. 1, Ch. 153, L. 1955.

Good Time Allowance

Under the "new" parole laws (sections 94-9821 to 94-9851) a prisoner retains the right to earn good time under the old good time statutes (sections 80-739, 80-741, repealed by Laws 1955, ch. 117, sec. 2 and section 80-740) and he is subject to

forfeiture of this good time. Hill v. State, 139 M 407, 365 P 2d 44, 46, 95 ALR 2d 1261.

The "new" parole laws (sections 94-9821 to 94-9851) have nothing to do with the forfeiture of earning of good time. Hill v. State, 139 M 407, 365 P 2d 44, 46, 95 ALR 2d 1261.

94-9822. Board of pardons—organization. There is hereby created a state board of pardons, hereinafter referred to as the "board," consisting of three (3) members who shall be appointed by the governor with the advice and consent of the senate. The board shall administer the executive

clemency, probation and parole system, and shall endeavor to secure the effective application and improvement of such system and the laws upon which it is based. The members of the board shall serve on a per diem basis and shall be paid at the rate of fifteen dollars (\$15.00) per day of service, plus actual and necessary expenses, and shall meet at least once each month at the state prison. The members of the board shall serve for terms of six (6) years, and until their successors are duly appointed and qualified, provided, however, that two (2) of those first appointed after this act takes effect, shall serve for terms of two (2) and four (4) years, respectively. The governor shall appoint the members of the board and call a meeting thereof within thirty (30) days of the effective date thereof. The board shall immediately thereafter set up the system herein provided for, and make the necessary appointments of its director, and other employees. Suitable quarters, supplies and equipment shall be provided. The principal office of the board shall be in Deer Lodge, Montana. A vacancy occurring before the expiration of any member's term of office shall be filled in the same manner for the unexpired portion of said term. The governor may at any time, after notice and hearing, remove any member for neglect of duty, malfeasance, misfeasance or nonfeasance in office.

History: En. Sec. 2, Ch. 153, L. 1955.

Powers of Board

The power of the state board of pardons is limited to permitting a convict to leave the inclosure of the state prison after he has served a period of confinement fixed for him by the board in accordance with section 94-9833. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Neither section 94-9832 nor any other section in the code gives the state board

Neither section 94-9832 nor any other section in the code gives the state board of pardons power to extinguish a former sentence by paroling a man to a subsequent sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Maximum sentences cannot be changed or altered by the state board of pardons. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

The state board of pardons does not have the right to pardon or commute a

sentence as the exclusive power to pardon and commute a sentence rests in the office of the governor under article VII, section 9 of the Montana constitution. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Collateral References

Pardon and Parole 34.
67 C.J.S. Pardons § 3.
39 Am. Jur. 530, Pardon, Reprieve and Amnesty, § 20.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR 2d 1074.

Statutes relating to parole or pardon of convicted criminals as subject to objection of denial of equal protection of laws, 152 ALR 1108.

94-9823. Definitions. When used in this act, unless the context otherwise requires:

- (a) "Probation" is the release by the court without imprisonment except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the board upon direction of the court.
- (b) "Parole" is the release to the community of a prisoner by the decision of the board prior to the expiration of his term, subject to conditions imposed by the board and subject to its supervision.
- (c) "Executive elemency" refers to the powers of the governor as provided by section 9 of article VII of the constitution of the state of Montana.

History: En. Sec. 3, Ch. 153, L. 1955.

Effect of Granting of a Parole

A parole releases from confinement a convict who has been committed to an institution, before the expiration of his sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

The granting of a parole to an escape sentence by virtue of the wording of section 94-4203 did not result in a discharge of the original sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

94-9824. Seal, orders, records, report. The board shall adopt an official seal of which the courts shall take judicial notice. A majority of the board shall constitute a quorum. Decision of the board may be by majority vote. The orders of the board shall not be reviewable except as to compliance of terms of this act. The board shall keep a record of its acts and decisions available to the public, providing, however, that all social records, including the pre-sentence report, the pre-parole report and the supervision history obtained in the discharge of official duty by any member or employee of the board, shall be confidential and shall not be disclosed directly or indirectly to anyone other than the members of the board or a judge; provided, however, that the board or a court may in its discretion, whenever the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful, permit the inspection of the report or any parts thereof by the prisoner or his attorney. The board shall report as provided in section 82-4002.

History: En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969.

94-9825. Director and employees—salaries to be paid monthly—approval and auditing. The board shall appoint a state director of probation and parole, hereinafter referred to as the "director" who shall appoint, with the approval of the board, an assistant director, probation and parole officers and other employees required to administer the provisions of this act. The director shall receive an annual salary in such amount as may be specified by the legislative assembly in the appropriation to the board of pardons payable monthly, which shall include compensation for all services rendered as interstate compact administrator. If the legislative assembly does not specify the maximum salary of the state director in the appropriation to the board of pardons, it shall be fixed by the board after approval by the board of examiners. Before approving any salary increase, the board of examiners shall review the salaries of comparable positions in Montana state government, other states, and private industry. All other officers and employees of the board shall receive such compensation for their services as may be fixed by the board. All officers and employees of the board shall hold office at the pleasure of the board and shall perform such duties as are imposed on them by law or by the board.

The salaries of all officers and employees of the board shall be paid monthly after such salaries have been approved by the board upon claims therefor.

History: En. Sec. 5, Ch. 153, L. 1955; 11, Ch. 97, L. 1961; amd. Sec. 10, Ch. 225, amd. Sec. 1, Ch. 122, L. 1957; amd. Sec. L. 1963; amd. Sec. 16, Ch. 237, L. 1967.

94-9826. Expenses to be paid. All expenses incurred by the board pursuant to the provisions of this act, including the actual and necessary

traveling and other expenses and disbursements of the members thereof, its officers and employees, incurred while on business of the board either within or without the state, shall, unless otherwise provided in this act, be paid from funds appropriated, after being approved by the board upon claims therefor.

History: En. Sec. 6, Ch. 153, L. 1955; amd. Sec. 12, Ch. 97, L. 1961.

94-9827. Legal adviser of the board. The board may appoint any qualified attorney or the attorney general to act as its legal adviser and represent it in all proceedings whenever so requested by the board.

History: En. Sec. 7, Ch. 153, L. 1955.

94-9828. Duties of the director. The director shall be the executive officer of the board. He shall be responsible for such investigation and supervision as may be requested by the board or the courts. He shall, subject to the approval of the board, divide the state into districts and assign probation and parole officers to serve in the various districts and courts; he shall obtain office quarters for such staff in each district as may be necessary. He shall assign the secretarial, bookkeeping and accounting work to the clerical employees, including receipt and disbursement of money. He shall direct the work of the probation and parole officers and other employees assigned to him. He shall formulate methods of investigation, supervision, record keeping and reports. He shall conduct training courses for the staff. He shall seek to co-operate with all agencies, public and private, which are concerned with the treatment or welfare of persons on probation or parole. He shall further be charged with the administration of the provisions of the interstate compact for the supervision of parolees and probationers.

History: En. Sec. 8, Ch. 153, L. 1955.

94-9829. Duties of probation and parole officers. Probation and parole officers shall investigate all persons referred to them for investigation by the director of probation and parole or by any court to which they are instructed by the director to serve. They shall furnish to each person released under their supervision a written statement of the conditions of probation or parole and shall instruct him regarding same. They shall keep informed of the conduct and condition of each person released under their supervision and use all suitable methods to aid and encourage him to bring about improvement in his conduct and condition. Probation and parole officers shall keep detailed records of their work. They shall supervise the collection and disbursement of all moneys when so instructed by the director in accordance with the orders of a court. They shall make such reports in writing as the director may require.

History: En. Sec. 9, Ch. 153, L. 1955.

94-9830. Conditions of probation or suspension of sentence. The board may adopt general rules or regulations concerning the conditions of probation or suspension of sentence. Such conditions shall apply in the absence of any specific or inconsistent conditions imposed by a court. Nothing herein contained shall limit the authority of the court to impose or modify

any general or specific conditions of probation or of suspension of sentence.

The probation and parole officer may recommend, and by order duly entered, a court may modify any condition of probation or suspension of sentence at any time. Due notice shall be given to the probation and parole officer before any such conditions are modified and he shall be given an opportunity to be heard thereon. The court shall cause a copy of any such order to be delivered to the probation and parole officer and the probationer.

History: En. Sec. 10, Ch. 153, L. 1955.

DECISIONS UNDER FORMER LAW

Governor's Pardoning Power

In the exercise of the pardoning power under former statute, the governor was authorized to impose conditions without

restriction, so long as they were not illegal, immoral, or impossible of performance. In re Sutton, $50~\mathrm{M}$ 88, 93, $145~\mathrm{P}$ 6.

94-9831. Arrest—subsequent disposition. At any time during probation or suspension of sentence a court may issue a warrant for the arrest of the defendant for violation of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be personally served upon the defendant. The warrant shall authorize all officers named therein to return such defendant to the custody of the court or to any suitable detention facility designated by the court. Any probation and parole officer may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of said probation and parole officer, violated the conditions of his release. Such written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation. Provisions regarding release on bail of persons charged with crime, shall be applicable to the defendants arrested under these provisions.

Upon such arrest and detention, the probation and parole officer shall immediately notify the court with jurisdiction over such prisoner, and shall submit in writing a report showing in what manner the defendant has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charged. The hearing may be informal or summary. If the violation is, established, the court may continue to revoke the probation or suspension of sentence, and may require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

A probationer or defendant under suspension of sentence for whose return a warrant has been issued by the court, shall, after the issuance of the warrant, if it is found that such warrant cannot be served, be deemed a fugitive from, or to have fled from, justice. If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest, or any part of it, shall be counted as time served on probation or suspended sentence, shall be determined by the court.

History: En. Sec. 11, Ch. 153, L. 1955.

Commencement of Sentence

Where relator was sentenced to four years' confinement and the execution of the sentence was then suspended, which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between the imposition of the suspended sentence and its revocation should have been credited to the relator and failure to do so resulted in his

illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P 2d 442.

Subsequent Arrest for Violation

Where petitioner was placed on probation for one year on conditions aimed at rehabilitating him, subsequent imposition of judgment after he violated his probation did not put him in jeopardy in violation of the federal constitution or section 18, article III, of the Montana constitution. In re Williams' Petition, 145 M 45, 399 P 2d 732.

- 94-9832. Parole authority and procedure. The board shall release on parole any person confined in the Montana state prison, except persons under sentence of death, when in its opinion there is reasonable probability that the prisoner can be released without detriment to himself or to the community, provided,
- 1. That no convict serving a time sentence shall be paroled until he shall have served at least one-quarter ($\frac{1}{4}$) of his full term, less good time allowances off, as provided in section 80-740; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half ($12\frac{1}{2}$) years;
- 2. No convict, serving a life sentence, shall be paroled until he shall have served twenty-five (25) years, less the good time allowances off, as provided in section 80-740. All parolees shall issue upon order of the board, duly adopted.

Within two (2) months after his admission and at such intervals thereafter as it may determine, the board shall consider all pertinent information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made.

Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board.

The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

History: En. Sec. 12, Ch. 153, L. 1955.

Compiler's Note

Section 80-740, referred to in the first and second paragraphs of this section, was repealed by Sec. 101, Ch. 199, Laws 1965. For present law, see sec. 80-1905.

Discretion of Board

Since the release of inmates on parole or by virtue of commutation of sentence rests in the discretion of the state board of pardons, their determination is not subject to review by the courts. Goff v. State, 139 M 641, 367 P 2d 557, 558.

Effect of Granting of a Parole

The effect of a parole granted a convict is to suspend the execution of the judgment until the end of the term of imprisonment, or until the paroled prisoner is rearrested for breach of the parole, and hence where such a prisoner was not rearrested after parole and enjoyed his liberty from the time of his discharge until the end of his term, he was thereafter prima facie rightfully at large and not subject to further restraint for the crime for which he was committed to prison. Anderson v. Wirkman, 67 M 176, 186, 215 P 224.

A parole releases from confinement a convict who has been committed to an institution, before the expiration of his sentence. State ex rel. Herman v. Powell,

139 M 583, 367 P 2d 553, 555.

The granting of a parole to an escape sentence by virtue of the wording of section 94-4203 did not result in a discharge of the original sentence. State ex rel, Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

Hearing

Hearings involving inmates of the state prison are set by the state board of pardons and are entirely within their discretion. The only requirement for a hearing or interview arises when the board is about to order a parole. Goff v. State, 139 M 641, 367 P 2d 557, 558.

In petition for writ of habeas corpus brought by an inmate of the state prison, allegation of bias and prejudice by a member of the state board of pardons was without merit, where the files of the board disclosed that such member had disqualified himself from participating in any hearing involving petitioner. Goff v. State, 139 M 641, 367 P 2d 557, 558.

Power of Board

This section does not give the state board of pardons power to extinguish a former sentence by paroling a man to a subsequent sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 555.

Right to Parole

All inmates confined in the Montana state prison are eligible for parole except those under death sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556.

In the case of consecutive sentences a prisoner is required to serve a period equivalent to one-fourth of the combined total of each sentence (less good time) before he is eligible for parole although subsequent sentence is for escape. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553.557.

P 2d 553, 557.
A prisoner is not entitled to release as a matter of right until he has completed his maximum sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556; Goff v. State, 139 M 641, 367 P 2d 557 559.

Verdict "Without Parole"

When jury returned verdict imposing sentence "without parole," trial court properly refused it since only parole board has authority to decide whether prisoner shall be paroled. State v. Brooks, 150 M 399, 436 P 2d 91.

Collateral References

Pardon and Parole 14 to 14.22. 67 C.J.S. Pardons § 17 et seq. 39 Am. Jur. 572 et seq., Pardon, Reprieve and Amnesty, § 81 et seq.

Statutes relating to parole or pardon of convicted criminals as subject to objection of denial of equal protection of laws. 152 ALR 1108.

DECISIONS UNDER FORMER LAW

Presumption That Board Performed Its Duty

In the absence of countervailing evidence, the presumption obtained that the state prison board in paroling a prisoner sentenced to life imprisonment for murder

regularly performed its duty and before granting the parole commuted his sentence, since without commutation in such case parole was not authorized by law. Anderson v. Wirkman, 67 M 176, 186, 215 P 224.

94-9833. Conditional release. A prisoner having served one-fourth $(\frac{1}{4})$ of his term or terms, less good time allowances, shall upon parole, be

deemed as released on parole until the expiration of the maximum term or terms for which he was sentenced less good time allowances as provided in section 80-740.

History: En. Sec. 13, Ch. 153, L. 1955.

Compiler's Note

Section 80-740, referred to in this section, was repealed by Sec. 101, Ch. 199, Laws 1965. For present law, see sec. 80-1905.

Good Time Allowance

Under former section 80-740 a convict,

by escaping, forfeits all his good time. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 557.

Right to Parole

An inmate with multiple sentences, whether concurrent or consecutive, is eligible for parole. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553, 556.

DECISIONS UNDER FORMER LAW

Conditional Release

The act of the governor, in granting a conditional release from the penitentiary of a person convicted of crime, was closely assimilated to a parole, which the governor had authority to grant under certain restrictions. In re Sutton, 50 M 88, 94, 145 P 6.

94-9834. Information from prison officials. It shall be the duty of all prison officials to grant to the members of the board, or its properly accredited representatives, access at all reasonable times to any prisoner over whom the board has jurisdiction under this act, to provide for the board or such representatives facilities for communicating with and observing such prisoner, and to furnish to the board such reports as the board shall require concerning the conduct and character of any prisoner in their custody and any other facts deemed by the board pertinent in determining whether such prisoner shall be paroled.

History: En. Sec. 14, Ch. 153, L. 1955.

94-9835. Persons may be heard—counsel. The board shall be required to hear oral statements from all persons desiring to be heard before the board and any person may be represented by counsel, provided that the board shall have the power to regulate procedure at all hearings.

History: En. Sec. 15, Ch. 153, L. 1955.

Subpoenas. The board shall have the power to issue subpoenas compelling the attendance of such witnesses and the production of such records, books, papers and documents as it may deem necessary for investigation of the case of any person before it. Subpoenas may be signed and oaths administered by the board or any member thereof. Subpoenas so issued may be served by any sheriff, constable, police officer, parole and probation officer, or other law-enforcement officer. In case of contumacy by, or refusal of any person to obey a subpoena issued to such person, any member of the board or duly authorized representative of any of them may make application to any court of record of this state and such court shall have jurisdiction to issue to such person an order requiring such person to appear before the board and there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail, or refuse to attend and testify, or to answer any lawful inquiry or to produce records, books, papers and other documents if it is in his power to do so, in obedience to a subpoena of the board or any member thereof, shall be punished by a fine of not more than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

History: En. Sec. 16, Ch. 153, L. 1955.

94-9837. Rules. The board shall have the power and duty to make rules for the conduct of persons heretofore or hereafter placed on parole or on probation under the supervision of the board by any court in this state, and for the investigation and supervision of such persons, except that the board shall not make any rule applying to a person on probation which conflicts with the conditions of probation imposed by the court.

History: En. Sec. 17, Ch. 153, L. 1955.

94-9838. Return of parole violator. At any time during release on parole or conditional release the board may issue a warrant for the arrest of the released prisoner for violations of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. The warrant shall authorize all officers named therein to return such prisoner to the actual custody of the penal institution from which he was released, or to any other suitable detention facility designated by the board. Any probation and parole officer may arrest such prisoner without a warrant, or may deputize any other officer with power to arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of said probation and parole officer, violated the conditions of his release. Such written statement delivered with the prisoner by the arresting officer to the official in charge of the institution from which the prisoner was released or other place of detention, shall be sufficient warrant for the detention of the parolee or conditional releasee. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation. Pending hearing, as hereinafter provided, upon any charge of violation, the prisoner shall remain incarcerated in such institution.

Upon such arrest and detention, the probation and parole officer shall immediately notify the board and shall submit in writing a report showing in what manner the prisoner has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged, under such rules and regulations as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release, or enter such other order as it may see fit.

A prisoner for whose return a warrant has been issued by the board shall, after the issuance of such warrant, if it is found that the warrant cannot be served, be deemed a fugitive or to have fled from justice. If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest, or any part

of it, shall be counted as time served under the sentence, shall be determined by the board.

History: En. Sec. 18, Ch. 153, L. 1955.

94-9839. Service of term for additional crime. Any prisoner who commits a crime while at large upon parole or conditional release, and who is convicted and sentenced therefor, shall serve such sentence concurrently with the terms under which he was released, unless otherwise ordered by the court in sentencing for the new offense.

History: En. Sec. 19, Ch. 153, L. 1955.

94-9840. Discharge of prisoner, parolee or conditional release. The period served on parole or conditional release shall be deemed service of the term of imprisonment, and, subject to the provisions contained in section 94-9838 relating to a prisoner who is a fugitive from, or has fled from, justice, the total time served may not exceed the maximum term or sentence. When a prisoner on parole or conditional release has performed the obligations of his release, the board shall make a final order or discharge and issue a certificate of discharge to the prisoner.

History: En. Sec. 20, Ch. 153, L. 1955.

94-9841. Cases of executive clemency. The board shall investigate and report to the governor with respect to all cases of pardons, remissions of fines and forfeitures, and commutations of punishment after conviction and judgment for any offenses committed against the criminal laws of the state. A majority of the board shall advise, investigate, and approve each such case before the action of the governor shall be final. All applications for executive clemency shall be made to the board, which shall cause an investigation to be made of all the circumstances surrounding the crime for which the applicant was convicted, and as to the individual circumstances relating to social conditions of the applicant. If the board, or a majority thereof, approves such application for executive clemency, it shall advise the governor and recommend action to be taken.

History: En. Sec. 21, Ch. 153, L. 1955.

94-9842. Notice of hearing applications for executive elemency. After the board has duly considered an application for executive elemency, and has by majority vote favored a recommendation of executive elemency to the governor, it must pass an order in substance as follows:

 History: En. Sec. 22, Ch. 153, L. 1955.

94-9843. Publication of order. The board must cause a copy of such order to be published in the newspaper therein designated, at least once a week for two weeks prior to the hearing, and at the same time cause to be deposited in the post office at the seat of government, postpaid, a copy of said order and notice addressed to the district judge, county attorney and sheriff, respectively, of the county where the crime was committed, and in like manner mail a copy of the order to the petitioner and the convict.

History: En. Sec. 23, Ch. 153, L. 1955.

94-9844. Proof of publication. Prior to the time set for hearing, proof of the publication of notice must be made by the publisher or managing agent.

History: En. Sec. 24, Ch. 153, L. 1955.

94-9845. Record of meeting, what to contain. At the hearing the board must cause to be kept a record showing:

- 1. The name of all persons appearing before the board on behalf of the person pardoned by the governor;
- 2. The name of all persons appearing before the board in opposition to the granting of the same;
 - 3. The testimony of all persons giving evidence before the board;
- 4. That the affidavit and return from the printer of the publication of the notice and order of hearing was on file prior to the hearing.

History: En. Sec. 25, Ch. 153, L. 1955.

- **94-9846.** When publication not necessary. No publication need be made as provided in sections 94-9842, 94-9843 and 94-9844, in the following cases:
- 1. When there is imminent danger of the death of the person convicted or imprisoned.
- 2. When the term of imprisonment of the applicant is within ten (10) days of its expiration.

History: En. Sec. 26, Ch. 153, L. 1955.

94-9847. Decision to be made. Within thirty (30) days after the hearing of any case, the board must make a decision in writing, and if such decision be made to recommend executive elemency, the copy of the decision, together with all papers used in each case shall be immediately transmitted to the governor.

History: En. Sec. 27, Ch. 153, L. 1955.

94-9848. Governor may respite. The governor has the power to grant respites after conviction and judgment, for any offenses committed against the criminal laws of the state, for such time as he thinks proper.

History: En. Sec. 28, Ch. 153, L. 1955.

94-9849. Governor to report to legislative assembly. The governor must communicate to the legislative assembly at each regular session, each case of remission of fine or forfeiture, reprieve, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto.

History: En. Sec. 29, Ch. 153, L. 1955.

94-9850. Cases of juveniles excluded. The provisions of this act shall not apply to probation in the juvenile courts or to parole from state institutions for juveniles.

History: En. Sec. 30, Ch. 153, L. 1955.

94-9851. Effective date—application to persons presently on parole or probation or eligible for. This act shall be in full force and effect from and after April 1, 1955. The provisions of this act are hereby extended to all persons who, at the effective date hereof, may be on probation or parole, or eligible to be placed on probation or parole under existing laws, with the same force and effect as if this act had been in operation at the time such persons were placed on probation or parole or became eligible to be placed thereon as the case may be, provided that no person convicted and sentenced before the effective date hereof shall have his rights and earned good time reduced by the application of this act.

History: En. Sec. 33, Ch. 153, L. 1955.

CHAPTER 99

BASTARDY PROCEEDINGS

Section 94-9901. Complaint in bastardy, what to contain, how entitled. 94-9902. Clerk to give notice, how and to whom. 94-9903. Lien upon real property, how created and for what. 94-9904. Judge may order attachment without bond, when.

94-9905. County attorney required to prosecute.
94-9906. Issue on the trial shall be "guilty" or "not guilty."
94-9907. Judgment and liability where accused found guilty.
94-9908. Power of court over judgments and orders.

94-9901. (12267) Complaint in bastardy, what to contain, how entitled. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding must be entitled in the name of the state against the accused as defendant.

History: Earlier acts were Secs. 1-6, pp. 40-43, L. 1874; re-en. Secs. 93-98, 5th Div. Rev. Stat. 1879; re-en. Secs. 150-155, 5th Div. Comp. Stat. 1887.

This section en. Sec. 2660, Pen. C. 1895; re-en. Sec. 9576, Rev. C. 1907; re-en. Sec. 12267, R. C. M. 1921.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, see Table A, M. R. Civ. P.

Constitutionality

Held, that the bastardy statute (sections 94-9901 to 94-9908) is not unconstitutional on the theory of defect of title based on the fact that, while proceedings in bastardy are civil in nature, it is found in the Penal Code having to do with crimes and criminal procedure, since the Revised Codes of 1921 were adopted as one act and the statute was merely carried forward from the Penal Code of 1895 into the codification of 1921, without amendment, as a matter of classification and convenience. State ex rel. Glasgow v. Hedrick, 88 M 551, 555, 294 P 375.

Collateral References

Bastards 33, 40. 10 C.J.S. Bastards §§ 51, 52, 63. 10 Am. Jur. 2d 912, Bastards, § 90.

Nonstatutory duty of father to support illegitimate child. 30 ALR 1069.

Death of principal as relieving against liability on bastardy bond. 31 ALR 602.

Validity and enforceability of promise to support or provide for illegitimate child. 39 ALR 434 and 159 ALR 1404. Admissibility and weight of evidence of resemblance on question of paternity

or other relationship. 40 ALR 97 and 95 ALR 314.

Financial status of defendant in bastardy proceedings as affecting amount of award for support and maintenance. 74 ALR 763.

Admissibility in prosecution for bastardy of evidence of prosecutrix's acquaintance or association with men other than defendant, on issue of paternity of child. 104 ALR 84.

Admissibility of evidence in a bastardy proceeding of defendant's reputation or character as to chastity and morality. 110 ALR 335.

Death of putative father before, pending, or after judgment as affecting bastardy proceedings. 119 ALR 632.

Temporary allowance for support or costs pending action or proceedings for declaration of paternity of an illegitimate child. 136 ALR 1264.

Effect of marriage of woman to one other than defendant upon her right to institute or maintain bastardy proceeding. 98 ALR 2d 256.

Right of mother to custody of illegitimate child. 98 ALR 2d 417.

(12268) Clerk to give notice, how and to whom. Upon the filing of the complaint, duly verified, the clerk must cause notice to be given to the person so charged, as in an ordinary action.

History: En. Sec. 2661, Pen. C. 1895; re-en. Sec. 9577, Rev. C. 1907; re-en. Sec. 12268, R. C. M. 1921.

Collateral References

Bastards \$\infty 42. 10 C.J.S. Bastards § 65. 10 Am. Jur. 2d 906, Bastards, § 81.

94-9903. (12269) Lien upon real property, how created and for what. From the time of the filing of such complaint, a lien is created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court; but no lien attaches until notice of the pendency of the action is filed in the county clerk's office of the county where the real property is situated.

History: En. Sec. 2662, Pen. C. 1895; re-en. Sec. 9578, Rev. C. 1907; re-en. Sec. 12269, R. C. M. 1921. Collateral References Bastards \$= 81. 10 C.J.S. Bastards § 116.

(12270) Judge may order attachment without bond, when. The district judge may order an attachment to issue thereon without an undertaking, which order must specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

History: En. Sec. 2663, Pen. C. 1895; re-en. Sec. 9579, Rev. C. 1907; re-en. Sec. 12270, R. C. M. 1921.

94-9905. (12271) County attorney required to prosecute. The county attorney, on being notified of the facts, must prosecute the matter in behalf of the complainant.

History: En. Sec. 2664, Pen. C. 1895; re-en. Sec. 9580, Rev. C. 1907; re-en. Sec. 12271, R. C. M. 1921.

94-9906. (12272) Issue on the trial shall be "guility" or "not guilty." The issue on the trial is "guilty" or "not guilty," and must be tried as an ordinary action.

History: En. Sec. 2665, Pen. C. 1895; re-en. Sec. 9581, Rev. C. 1907; re-en. Sec. 12272, R. C. M. 1921.

Collateral References
Bastards 72.
10 C.J.S. Bastards § 107.

94-9907. (12273) Judgment and liability where accused found guilty. If the accused is found guilty he must be charged with the maintenance of the child, in such sum, and in such manner as the court directs, with the costs of suit; and the clerk may issue execution for any sum ordered, to be paid immediately, and afterwards, from time to time, as may be required to compel compliance with the order of the court, and the defendant may be committed to the county jail until he complies with the order or judgment.

History: En. Sec. 2666, Pen. C. 1895; re-en. Sec. 9582, Rev. C. 1907; re-en. Sec. 12273, R. C. M. 1921.

Monthly Allowance of \$25 for Maintenance of Child Held Warranted

Award of \$25 per month for the maintenance of a child born out of wedlock to be paid by defendant in a bastardy proceeding, held warranted by the evidence showing that while he was earning only \$55 at the time of trial, he had at times earned as much as \$120 per month. State v. Kuilman, 111 M 459, 462, 110 P 2d 969.

Operation and Effect

Quaere: May a putative father, if found guilty under the bastardy statute, be released from the obligation imposed upon him, by this section, to support his bastard child, by agreement with the prosecutrix before the birth of the child? State ex rel. Glasgow v. Hedrick, 88 M 551, 558, 294 P 375.

Collateral References

Bastards \$\iiint 78, 81, 83.

10 C.J.S. Bastards \\$\\$\ 111, 116, 117.

10 Am. Jur. 2d 935 et seq., Bastards, \\$\ 126 et seq.

94-9908. (12274) Power of court over judgments and orders. The court may at any time enlarge, diminish, or vacate any order or judgment rendered in the proceedings, on such notice to the defendant as the court or judge may prescribe.

History: En. Sec. 2667, Pen. C. 1895; re-en. Sec. 9583, Rev. C. 1907; re-en. Sec. 12274, R. C. M. 1921.

Collateral References

Bastards \$\frac{100}{275}.

10 C.J.S. Bastards \$\\$ 109, 110, 112-114.

10 Am. Jur. 2d 938, Bastards, \$\\$ 131.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable. 16 ALR 2d 1098.

CHAPTER 100

JUSTICES' AND POLICE COURT PROCEEDINGS-APPEALS

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-100-1 to 94-100-46. (12302 to 12347) Repealed.

Repeal

Sections 94-100-1 to 94-100-46 (Secs. 472, 476, 477, 479, 490, 492, 493, 503, 504, 510, pp. 262 to 265, Cod. Stat. 1871; Secs. 2680 to 2725, Pen. C. 1895; Sec. 1, Ch. 50, L. 1955), relating to proceedings in and appeals from justices' and police courts, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see sec. 95-1102, Title 95, chs. 16 and 17, secs. 95-1801, 95-1908, 95-1909, 95-1913, and Title 95, ch. 20.

CHAPTER 101

THE WRIT OF HABEAS CORPUS

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-101-1 to 94-101-33. (12348 to 12380) Repealed.

Repeal

Sections 94-101-1 to 94-101-33 (Secs, 2769, 2771, Pen. C. 1895; Secs. 9630 to 9662, Rev. C. 1907), relating to habeas

corpus, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see secs. 95-2701 to 95-2713, 95-2715, and 95-2716.

CHAPTER 201

CORONER'S INQUESTS

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-201-1 to 94-201-13. (12381 to 12393) Repealed.

Repeal

Sections 94-201-1 to 94-201-13 (Secs. 2790 to 2802, Pen. C. 1895; Sec. 1, Ch. 56, L. 1959), relating to coroner's inquests, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 6, and secs. 95-803 to 95-809.

CHAPTER 301

SEARCH WARRANTS

(Repealed—Section 2, Chapter 196, Laws of 1967)

94-301-1 to 94-301-21. (12394 to 12414) Repealed.

Repeal

Sections 94-301-1 to 94-301-21 (Secs. 2820 to 2840, Pen. C. 1895), relating to

search warrants, were repealed by Sec. 2, Ch. 196, Laws 1967. For new law, see Title 95, ch. 7.

CHAPTER 401

REWARD FOR APPREHENSION OF FUGITIVES FROM JUSTICE AND PERSONS COMMITTING ROBBERY ON CERTAIN CONVEYANCES

Section 94-401-1. Rewards for the apprehension of fugitives from justice. 94-401-2. Standing reward.

94-401-3. Payment of reward.

- 94-401-1. (12415) Rewards for the apprehension of fugitives from justice. The governor may offer a reward not exceeding one thousand dollars, payable out of the general fund, for the apprehension-
 - 1. Of any convict who has escaped from the state prison; or,
- 2. Of any person who has committed, or is charged with the commission of a felony.

History: En. Sec. 2850, Pen. C. 1895; re-en. Sec. 9697, Rev. C. 1907; re-en. Sec. 12415, R. C. M. 1921. Cal. Pen. C. Sec. Collateral References Rewards \$\infty 4. 77 C.J.S. Rewards § 10. 46 Am. Jur. 105, Rewards, generally.

94-401-2. (12416) Standing reward. The governor must offer a standing reward of three hundred dollars for the arrest of any person engaged in the robbery of, or in an attempt to rob, any person or persons upon, or having in charge, in whole or in part, any stage coach, wagon, railroad train, or other conveyance, engaged at the time in carrying passengers; or any private conveyance within this state, the reward to be paid to the person making the arrest, immediately upon the conviction of the person arrested: but no reward shall be paid except after such conviction.

12416, R. C. M. 1921. Cal. Pen. C. Sec. History: En. Sec. 2851, Pen. C. 1895; re-en. Sec. 9698, Rev. C. 1907; re-en. Sec.

94-401-3. (12417) Payment of reward. When a person apprehends and delivers to the proper sheriff or officer the person for whose apprehension a reward is offered, he must take his certificate of such delivery, and the governor, on the production of such certificate, must certify the amount of the claim to the auditor.

History: Ap. p. Sec. 458, p. 259, Cod. Stat. 1871; re-en. Sec. 458, 3d_Div. Rev. Stat. 1879; re-en. Sec. 460, 3d Div. Comp. Stat. 1887; amd. Sec. 2852, Pen. C. 1895; re-en. Sec. 9698, Rev. C. 1907; re-en. Sec. 12417, R. C. M. 1921.

Collateral References

Rewards \$\infty\$13.

77 C.J.S. Rewards § 34.

46 Am. Jur. 120, Rewards, § 26.

CHAPTER 501

UNIFORM CRIMINAL EXTRADITION ACT

Section 94-501-1. Definitions. Fugitives from justice—duty of governor. 94-501-2, 94-501-3. Demand—form. 94-501-4. Investigation by governor. 94-501-5. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. Extradition of persons not present in demanding state at time of 94-501-6. commission of crime. 94-501-7. Issuance of warrant of arrest by governor-recitals therein. Execution of warrant—manner and place thereof. Authority of arresting officer. 94-501-8. 94-501-9. 94-501-10. Rights of accused person-application for writ of habeas corpus. 94-501-11. Penalty for noncompliance with preceding section. 94-501-12. Confinement of accused in jail when necessary. Arrest of accused before making of requisition. Arrest of accused without warrant therefor. 94-501-13. 94-501-14. 94-501-15. Commitment to await requisition-bail.

94-501-16. Bail—in what cases—conditions of bond. 94-501-17. Extension of time of 94-501-18. Bail—when forfeited. Extension of time of commitment adjournment.

- 94-501-19. Persons under criminal prosecution in this state at time of requi-
- 94-501-20. Guilt or innocence of accused, when inquired into.
- 94-501-21. Alias warrant of arrest.
- 94-501-22. Fugitives from this state—duty of governors.
- Application for issuance of requisition—by whom made—contents. Fugitives from this state—accounts. 94-501-23.
- 94-501-24.
- No fee to be paid to public officer procuring surrender. 94-501-25.
- 94-501-26. Receiving fee for services in arresting fugitives.
- 94-501-27. Immunity from service of process in certain civil actions.
- 94-501-28.
- 94-501-29.
- Written waiver of extradition proceedings.

 Nonwaiver by this state.

 No immunity from other criminal prosecutions while in this state. 94-501-30.
- 94-501-31. Interpretation.
- 94-501-32. Short title.
- 94-501-1. Definitions. Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

History: En. Sec. 1, Ch. 190, L. 1937.

NOTE.—Uniform State Law. Sections 94-501-1 through 94-501-32 constitute the "Uniform Criminal Extradition Act" approved by the National Conference of Commissioners on Uniform State Laws in 1937 and adopted in the states of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, and also in the Virgin Islands.

Collateral References

Extradition 23, 24.

35 C.J.S. Extradition §§ 1, 4.

31 Am. Jur. 2d 921, Extradition.

Right to delay of one arrested on extradition warrant to enable him to present evidence that he is not subject to extradition. 11 ALR 1410.

Right to prove alibi or absence from demanding state. 51 ALR 797 and 61

Bar of limitations as proper subject of investigation in habeas corpus proceedings for release of one sought to be extradited. 77 ALR 902.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry on habeas corpus. 94 ALR 1496.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings. 114 ALR

Demanding papers in extradition proceedings as making out prima facie case of habeas corpus proceeding that accused was present in demanding state at time of commission of alleged crime or that he is a fugitive. 135 ALR 973.

94-501-2. Fugitives from justice—duty of governor. Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History: En. Sec. 2, Ch. 190, L. 1937.

Collateral References

Extradition 23, 24, 30. 35 C.J.S. Extradition §§ 4, 10. 31 Am. Jur. 2d 956, Extradition, § 47.

94-501-3. Demand—form. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 94-501-6, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

History: En. Sec. 3, Ch. 190, L. 1937.

Improper Form, Discharge of Fugitive

If the demand for extradition to the governor of the asylum state is not in proper form, the alleged fugitive will be discharged. State v. Booth, 134 M 235, 328 P 2d 1104, 1109.

Substantial Charge of Crime

A substantial charge of crime in the required papers submitted by the demanding state is a sufficient basis for extradition. State v. Booth, 134 M 235, 328 P 2d 1104, 1110.

Collateral References

Extradition©=34. 35 C.J.S. Extradition §§ 13, 14. 31 Am. Jur. 2d 945 et seq., Extradition, 30 et seq.

94-501-4. Investigation by governor. When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

History: En. Sec. 4, Ch. 190, L. 1937.

Collateral References

Extradition ≈35. 35 C.J.S. Extradition § 15. 31 Am. Jur. 2d 956, Extradition, § 48.

94-501-5. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner

provided in section 94-501-23 with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

History: En. Sec. 5, Ch. 190, L. 1937.

Collateral References

Extradition ≈ 31.

35 C.J.S. Extradition § 11.

31 Am. Jur. 2d 977, Extradition, § 71.

94-501-6. Extradition of persons not present in demanding state at time of commission of crime. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 94-501-3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

History: En. Sec. 6, Ch. 190, L. 1937.

Collateral References
Extradition © 28.
35 C.J.S. Extradition § 8.
31 Am. Jur. 2d 936, Extradition, § 19.

94-501-7. Issuance of warrant of arrest by governor—recitals therein. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: En. Sec. 7, Ch. 190, L. 1937.

Collateral References
Extradition ≈ 36.
35 C.J.S. Extradition § 16.
31 Am. Jur. 2d 966, Extradition, § 61.

- 94-501-8. Execution of warrant—manner and place thereof. Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.
 - History: En. Sec. 8, Ch. 190, L. 1937.
- 94-501-9. Authority of arresting officer. Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: En. Sec. 9, Ch. 190, L. 1937.

94-501-10. Rights of accused person—application for writ of habeas corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for

his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

History: En. Sec. 10, Ch. 190, L. 1937. Collateral References Extradition € 39.

35 C.J.S. Extradition § 17. 31 Am. Jur. 2d 970 et seq., Extradition, § 64 et seq.

94-501-11. Penalty for noncompliance with preceding section. Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than \$1,000.00 or be imprisoned not more than six months, or both.

History: En. Sec. 11, Ch. 190, L. 1937.

94-501-12. Confinement of accused in jail when necessary. The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: En. Sec. 12, Ch. 190, L. 1937.

94-501-13. Arrest of accused before making of requisition. Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission

of any crime in any other state, and, except in cases arising under section 94-501-6 with having fled from justice, or, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 94-501-6, has fled from justice, or with having been convicted of a crime in that state and having escaped from bail, probation or parole and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History: En. Sec. 13, Ch. 190, L. 1937.

94-501-14. Arrest of accused without warrant therefor. The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

History: En. Sec. 14, Ch. 190, L. 1937.

94-501-15. Commitment to await requisition—bail. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except in cases arising under section 94-501-6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

History: En. Sec. 15, Ch. 190, L. 1937.

94-501-16. Bail—in what cases—conditions of bond. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified

in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

History: En. Sec. 16, Ch. 190, L. 1937.

Collateral References
Extradition ≈ 37.
35 C.J.S. Extradition § 19.
31 Am. Jur. 2d 942, Extradition, § 27.

94-501-17. Extension of time of commitment adjournment. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of sixty (60) days, or a supreme court justice or county judge may again take bail for his appearance and surrender, as provided in section 94-501-16, but within a period not to exceed sixty (60) days after the date of such new bond or undertaking.

History: En. Sec. 17, Ch. 190, L. 1937.

94-501-18. Bail—when forfeited. If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History: En. Sec. 18, Ch. 190, L. 1937.

94-501-19. Persons under criminal prosecution in this state at time of requisition. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

History: En. Sec. 19, Ch. 190, L. 1937.

94-501-20. Guilt or innocence of accused, when inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

History: En. Sec. 20, Ch. 190, L. 1937.

Operation and Effect

It is sufficient in habeas corpus proceedings to justify holding the petitioner if it is shown in Montana that the governor received from the governor of Oregon a copy of the affidavit made by the

prosecuting witness, charging the defendant with a felony and also of the warrant of arrest issued by the judge of a district court of the state of Oregon and duly authenticated. State ex rel. Middlemas v. District Court, 125 M 310, 233 P 2d 1038, 1040.

94-501-21. Alias warrant of arrest. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. History: En. Sec. 21, Ch. 190, L. 1937.

94-501-22. Fugitives from this state—duty of governors. Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History: En. Sec. 22, Ch. 190, L. 1937.

Collateral References
Extradition ≈ 36.
35 C.J.S. Extradition § 16.

94-501-23. Application for issuance of requisition—by whom made—contents. I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the government indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

History: En. Sec. 23, Ch. 190, L. 1937.

94-501-24. Fugitives from this state—accounts. When the governor of this state, in the exercise of the authority conferred by section 2, article IV, of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners, and paid out of the state treasury.

History: En. Sec. 24, Ch. 190, L. 1937.

94-501-25. (12428) No fee to be paid to public officer procuring surrender. No compensation, fee or reward of any kind can be paid to or received by a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in section 94-501-24 or for the surrender of the fugitive or for conveying him to this state, or detaining him therein, except as provided for in such section.

History: En. Sec. 2863, Pen. C. 1895; 12428, R. C. M. 1921; amd. Sec. 1, Ch. 38, re-en. Sec. 9710, Rev. C. 1907; re-en. Sec. L. 1947. Cal. Pen. C. Sec. 1558.

94-501-26. (10919) Receiving fee for services in arresting fugitives. Every person who violates any of the provisions of section 94-501-25 is guilty of a misdemeanor.

History: En. Sec. 273, Pen. C. 1895; re-en. Sec. 8255, Rev. C. 1907; re-en. Sec. 10919, R. C. M. 1921. Cal. Pen. C. Sec. 144.

Collateral References Extradition ← 40. 35 C.J.S. Extradition § 23.

94-501-27. Immunity from service of process in certain civil actions. A person brought into this state on, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History: En. Sec. 25, Ch. 190, L. 1937.

94-501-28. Written waiver of extradition proceedings. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 94-501-7 and 94-501-8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 94-501-10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The

judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

History: En. Sec. 25-A, Ch. 190, L. 1937.

94-501-29. Nonwaiver by this state. Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of is right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, a sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

History: En. Sec. 25-B, Ch. 190, L. 1937.

94-501-30. No immunity from other criminal prosecutions while in this state. After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: En. Sec. 26, Ch. 190, L. 1937.

94-501-31. Interpretation. The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

History: En. Sec. 27, Ch. 190, L. 1937.

94-501-32. Short title. This act may be cited as the Uniform Criminal Extradition Act.

History: En. Sec. 30, Ch. 190, L. 1937.

CHAPTER 601

MISCELLANEOUS PROVISIONS RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE

(Repealed-Section 2, Chapter 196, Laws of 1967)

94-601-1 to 94-601-3. (12429 to 12431) Repealed.

Repeal
Sections 94-601-1 to 94-601-3 (Secs. 2890 to 2892, Pen. C. 1895), relating to special

proceedings, designation of parties, entitling affidavits, and subpoenas, were repealed by Sec. 2, Ch. 196, Laws 1967.

CHAPTER 701

PRISONER'S ATTENDANCE AT COURT—HOW OBTAINED

Section 94-701-1. Persons imprisoned in state prison or in another county, how brought before a court.

94-701-1. (12432) Persons imprisoned in state prison or in another county, how brought before a court. When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made.

History: En. Sec. 2900, Pen. C. 1895; re-en. Sec. 9714, Rev. C. 1907; re-en. Sec. 12432, R. C. M. 1921. Cal. Pen. C. Sec. 1567.

Proper Procedure

Inmate of state prison, who sought speedy trial upon a justice court complaint, by virtue of which a detainer had been filed at the prison, should have petitioned the district court setting forth the facts of complaint against him and requested a speedy trial, rather than directing such request to the county attorney or petitioning the supreme court. Petion of Ditton, 145 M 594, 403 P 2d 205.

Collateral References

Prisons € 13.
72 C.J.S. Prisons § 18.
58 Am. Jur. 28, Witnesses, § 12.

CHAPTER 801

FINES AND FORFEITURES-DISPOSAL OF

Section 94-801-1. Fines, costs, and forfeitures, how disposed of. 94-801-2. Traffic fines collected from juvenile offenders—disposition.

94-801-1. (12433) Fines, costs, and forfeitures, how disposed of. All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must, save as hereinafter provided, be paid to the county treasurer of the county in which the court is held and if not otherwise provided by law, by him credited to the general school fund of said county. In the event the fine or forfeiture arises from an action commenced pursuant to section 94-301 or section 94-304 of this code, the residue thereof, after such costs are paid, may be directed by the court to be paid, in whole or in part, to the wife, or to the guardian or custodian of the child or children. If the said fine or forfeiture is paid to the county treasurer at the time of such payment there shall be filed with the county treasurer, a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action, which statement shall give the title of the cause and be subscribed by the person or officer making such payment.

History: En. Sec. 2910, Pen. C. 1895; re-en. Sec. 9715, Rev. C. 1907; re-en. Sec. 12433, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1923; amd. Sec. 1, Ch. 92, L. 1961. Cal. Pen. C. Sec. 1570.

Applicable to Contempt Proceedings

This section is applicable to contempt proceedings, and costs incurred therein must be paid from any fine imposed. State ex rel. Flynn v. District Court, 24 M 33, 36, 60 P 493. See also Dunlavey v. Doggett, 38 M 204, 209, 99 P 436.

Money Received in Action on Bail Bond

State, to which bail bond ran, and not county, was proper party plaintiff in action on bond even though money recovered would go to county. County of Wheatland v. Van, 64 M 113, 116, 207 P 1003.

Collateral References

Fines Forfeiture 10.

36A C.J.S. Fines § 19; 37 C.J.S. Forfeitures § 8.

21 Am. Jur. 2d 555, Criminal Law, § 599; 36 Am. Jur. 2d 622 et seq., Forfeitures and Penalties, § 15 et seq.

94-801-2. Traffic fines collected from juvenile offenders—disposition. All fines collected by the district courts from children under eighteen (18) years of age, for unlawful operation of motor vehicles resulting from traffic summonses issued by the peace officers of the cities, counties, or by highway patrolmen, together with that portion of the fines which is specified in section 75-5304, shall be retained by the county treasurer of the county in which the offense occurred and at the end of each month distributed as follows:

- (a) Fines collected as the result of summonses issued by city police officers shall be distributed to the city in which the police officer is employed, and credited to the city general fund;
- (b) Fines collected as the result of summonses issued by county peace officers shall be retained by the county treasurer and credited to the county road fund;
- (c) Fines collected as the result of summonses issued by state highway patrolmen shall be paid to the state treasurer of Montana and by him credited to the general fund of the state;
- (d) That portion of the fines, as provided for in section 75-5304, shall be paid to the state treasurer of Montana and by him credited to the automobile driver education account in the earmarked revenue fund.

History: En. Sec. 1, Ch. 149, L. 1961; amd. Sec. 11, Ch. 226, L. 1965; amd. Sec. 10, Ch. 214, L. 1969.

CHAPTER 901

RECIPROCAL ENFORCEMENT OF SUPPORT

(Repealed-Section 3, Chapter 208, Laws of 1961)

94-901-1 to 94-901-18. Repealed.

Repeal

Sections 94-901-1 to 94-901-18 (Secs. 1 to 18, Ch. 222, L. 1951), relating to reciprocal

enforcement of support, were repealed by Sec. 3, Ch. 208, Laws 1961. For new provisions, see secs. 93-2601-41 to 93-2601-82.

CHAPTER 1001

CRIMINAL LAW STUDY COMMISSION

Section 94-1001-1.

94-1001-2.
94-1001-3.
94-1001-4.
94-1001-5.
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94-1001-7.
Parameter of criminal law study commission—scope of work.
Composition of commission—application for appointment.
Distribution of proposed changes to bench and bar.
Submission of final draft to supreme court.
Notice by supreme court to bench and bar—hearings.
Legislative adoption required.
94-1001-8.
Changes suggested by supreme court.

94-1001-9. Enployment of secretary and research services by commission. 94-1001-10. Reimbursement of commission members. 94-1001-11. Officers of commission—rules—records.

94-1001-1. Intent and purpose of act. The intent and purpose of this act is to establish a commission to suggest changes in the criminal law of the state of Montana to the end of uniformity in definition of crimes, arrests, trials, sentencing, pardon and parole.

History: En. Sec. 1, Ch. 103, L. 1963.

94-1001-2. Appointment of criminal law study commission—scope of work. That within thirty (30) days following the adjournment of this legislative assembly, the supreme court of Montana shall appoint a commission of eleven (11) persons, which commission shall meet and organize itself within thirty (30) days following appointment; and which commission shall make a complete study, consider and finally prepare suggested changes in the criminal law of the state of Montana to the end of uniformity in definition of crimes, arrests, trials, sentencing, pardon and parole, which suggested changes shall be comprehensive in scope.

History: En. Sec. 2, Ch. 103, L. 1963.

94-1001-3. Composition of commission—application for appointment. The commission shall be composed of the chief justice of the supreme court of the state of Montana, or an associate justice of the supreme court designated by the chief justice, three (3) judges from the district court of the state, and seven (7) lawyers. The judges so selected shall be from a list of suggested members submitted to the supreme court by the president of the Montana judges' association. Any lawyer actively engaged in the practice of law in the state of Montana or members of the faculty of the Montana university law school may submit an application to the supreme court indicating a desire to serve on such commission. The supreme court shall select members of the commission from among the applicants. The supreme court shall have the power to provide for terms of office, removals from office, filling of vacancies and changes in personnel of the commission.

History: En. Sec. 3, Ch. 103, L. 1963.

94-1001-4. Distribution of proposed changes to bench and bar. The commission so appointed shall prepare its suggested changes and shall distribute copies to the bench and bar of the state for their consideration and suggestions as they may submit to the commission.

History: En. Sec. 4, Ch. 103, L. 1963.

- 94-1001-5. Submission of final draft to supreme court. The commission shall within six (6) months after distribution of copies of the suggested changes submit the tentative final draft of suggested changes in the criminal law of the state of Montana, to the supreme court for approval. History: En. Sec. 5, Ch. 103, L. 1963.
- 94-1001-6. Notice by supreme court to bench and bar-hearings. The submission of the tentative final draft to the supreme court will be noticed by the court by mailing notice of hearing to all district judges of the state and all attorneys licensed to practice in the Montana courts, as shown by

the records of the clerk of the supreme court, and heard by it within ninety (90) days after submission by the commission, and all interested persons and organizations may appear that day by petition specifying their suggestions or objections thereon.

History: En. Sec. 6, Ch. 103, L. 1963.

94-1001-7. Legislative adoption required. Any suggested changes promulgated under this act shall be effective only upon adoption by the legislature.

History: En. Sec. 7, Ch. 103, L. 1963.

94-1001-8. Changes suggested by supreme court. The supreme court of this state shall have the right to suggest changes and amendments to the criminal law of the state of Montana from time to time for consideration by the legislative assembly.

History: En. Sec. 8, Ch. 103, L. 1963.

94-1001-9. Employment of secretary and research services by commission. The said commission may from time to time employ a secretarystenographer, as it deems necessary, to assist in its work, and shall fix the compensation of such secretary-stenographer. It shall further have the power to employ the services of any research agency which it deems necessary in the discharge of its duties.

History: En. Sec. 9, Ch. 103, L. 1963.

94-1001-10. Reimbursement of commission members. Members of said commission shall serve without compensation, but shall be reimbursed for actual travel and other expenses incurred in the discharge of their duties. including attendance at meetings.

History: En. Sec. 10, Ch. 103, L. 1963.

94-1001-11. Officers of commission—rules—records. The said commission shall from time to time elect one of its members as chairman, and may from time to time elect such other officers from among its membership as the commission may deem desirable. The commission is empowered to adopt rules for its own procedure, and to make all arrangements for its meetings, and to carry out the purpose for which it is created. The commission is directed to keep accurate records of its activities and proceedings.

History: En. Sec. 11, Ch. 103, L. 1963.

CHAPTER 1101

INTERSTATE AGREEMENT ON DETAINERS

Section 94-1101-1. Agreement on detainers adopted—text. 94-1101-2. District courts to act.

94-1101-3. Enforcement and co-operation by public agencies.

94-1101-4. Escape from custody on detainer—penalty.
94-1101-5. Institutional officers to honor agreement.
94-1101-6. Co-ordinator of agreement—appointment—duties.

94-1101-1. Agreement on detainers adopted—text. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows: The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of co-operative procedures. It is the further purpose of this agreement to provide such co-operative procedures.

Article II

As used in this agreement:

- (a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the commonwealth of Puerto Rico.
- (b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.
- (c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to article III or article IV hereof.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial at the next term of court after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

- (b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt request[ed].
- (c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.
- Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.
- (e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradiction to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.
- (f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V (a) hereof upon presentation of a written request for temporary

custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

- (b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.
- (c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
- (d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.
- (e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending state shall offer to deliver
temporary custody of such prisoner to the appropriate authority in the state
where such indictment, information or complaint is pending against such
person in order that speedy and efficient prosecution may be had. If the
request for final disposition is made by the prisoner, the offer of temporary
custody shall accompany the written notice provided for in article III of
this agreement. In the case of a federal prisoner, the appropriate authority
in the receiving state shall be entitled to temporary custody as provided by
this agreement or to the prisoner's presence in federal custody at the place
for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the

state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

- (c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the periods provided by this act, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.
- (d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.
- (e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.
- (f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.
- (g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.
- (h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI

- (a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.
- (b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstances is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to all severable matters.

History: En. Sec. 1, Ch. 215, L. 1963.

94-1101-2. District courts to act. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean; district courts.

History: En. Sec. 2, Ch. 215, L. 1963.

94-1101-3. Enforcement and co-operation by public agencies. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and

to co-operate with one another and with other party states in enforcing the agreement and effectuating its purpose.

History: En. Sec. 3, Ch. 215, L. 1963.

94-1101-4. Escape from custody on detainer—penalty. Every prisoner confined in state prison for a term less than for life who has been lawfully delivered into the temporary custody of appropriate officers of a party state for trial on a charge or detainer based on an untried indictment, information or complaint and who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.

History: En. Sec. 4, Ch. 215, L. 1963.

94-1101-5. Institutional officers to honor agreement. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

History: En. Sec. 5, Ch. 215, L. 1963.

94-1101-6. Co-ordinator of agreement—appointment—duties. The governor shall appoint an officer of this state as co-ordinator of this agreement who, acting jointly with like officers of party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this act, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

History: En. Sec. 6, Ch. 215, L. 1963.

Transmittal of Copies of Act

Section 7 of Ch. 215, Laws 1963 read "Copies of this act shall, upon its ap-

proval, be transmitted to the governor of each state, the attorney general and the administrator of general services of the United States, and the council of state governments."

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TITLE 95

MONTANA CODE OF CRIMINAL PROCEDURE

NOTE—The Montana Code of Criminal Procedure was enacted by Chapter 196, Laws 1967. Included in this printing of the Code are amendments and new provisions enacted by the 1969 Legislative Assembly and amendments adopted by Supreme Court Order 1145-2-3-4, effective December 1, 1968.

The new Montana Code of Criminal Procedure is based upon the old Montana code, Montana case law, federal case law, statutes and decisions of sister states and proposed model legislation. The code most relied upon was the Illinois Code of Criminal Procedure, passed in 1963.

The revised commission comments and source materials were prepared by Professor Larry M. Elison, School of Law, University of Montana, vicechairman of the Montana Criminal Law Commission.

Other explanatory notes, history notes, cross-references and case annotations were prepared by the publisher's editorial staff.

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CHAPTER 1

SCOPE, PURPOSE AND CONSTRUCTION

Section 95-101. Scope. 95-102. Purpose and construction.

95-101. Scope. These provisions shall govern the procedure in the courts of Montana in all criminal proceedings except where provision for a different procedure is specifically provided by law.

History: En. 95-101 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Pro-L. 1967. cedure, Chapter 38, section 100-2.

95-102. Purpose and construction. These provisions are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.

History: En. 95-102 by Sec. 1, Ch. 196,

CHAPTER 2

DEFINITIONS

Section 95-201. Meanings of words and phrases.

95-202. Singular term includes plural-gender.

95-203. Charge.

95-204. Conviction.

95-205. Court.

95-206. Judge.

95-207. Judgment.

95-208. Magistrate.

95-209. Offense. 95-210. Peace offic 95-211. Sentence. Peace officer.

95-201. Meanings of words and phrases. For the purposes of this code, the words and phrases described in this chapter have the meanings designated in this chapter, except when a particular context clearly requires a different meaning.

History: En. 95-201 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Pro-L. 1967. cedure, Chapter 38, section 102-1.

95-202. Singular term includes plural—gender. Singular term shall include the plural and the masculine gender shall include the feminine except when a particular context clearly requires a different meaning.

History: En. 95-202 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Pro-L. 1967. cedure, Chapter 38, section 102-3.

Charge. "Charge" means a written statement presented to a court accusing a person of the commission of an offense and includes complaint, information and indictment.

History: En. 95-203 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 102-8.

Collateral References

Criminal Law 205; Indictment and Information = 1.

22 C.J.S. Criminal Law § 300; Indictments and Information § 5.

Conviction. "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

History: En. 95-204 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Pro-L. 1967. cedure, Chapter 38, section 2-5.

95-205. Court. "Court" means a place where justice is judicially administered and includes a judge thereof.

History: En. 95-205 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 102-10.

95-206. Judge. "Judge" means a person who is invested by law with the power to perform judicial functions and includes court, justice of the peace or police magistrate when a particular context so requires.

History: En. 95-206 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 102-13.

95-207. Judgment. "Judgment" means an adjudication by the court that the defendant is guilty or not guilty and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court.

History: En. 95-207 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 102-14.

- 95-208. Magistrate. "Magistrate" is an officer having power to issue a warrant for the arrest of a person charged with an offense and includes:
 - (a) The justices of the supreme court.
 - b) The judges of the district courts.
 - (c) Justices of the peace.
 - (d) Police magistrates in towns or cities.

History: En. 95-208 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-4904 and 94-4905.

Public Offenses

Prosecution for violation of city ordinance, punishable by fine, was one for a "public offense" within former section giving police magistrate power to issue war-

rant for arrest of a person charged with a public offense and former statute governing police court procedure. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

Collateral References

Criminal Law 207 (1). 22 C.J.S. Criminal Law §§ 306, 334.

95-209. Offense. "Offense" means a violation of any penal statute of this state or of any ordinance of its political subdivisions.

History: En. 95-209 by Sec. 1, Ch. 196, L. 1967. Source: Illinois Code of Criminal Procedure, Chapter 38, section 102-15.

Cross-References

Crime and public offense defined, sec. 94-112.

95-210. Peace officer. "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

History: En. 95-210 by Sec. 1, Ch. 196, L. 1967. Source: Illinois Code of Criminal Procedure, Chapter 38, section 2-13.

Collateral References

Officers 1. 67 C.J.S. Officers § 2.

95-211. Sentence. "Sentence" is the punishment imposed on the defendant by the court.

History: En. 95-211 by Sec. 1, Ch. 196, L. 1967.

CHAPTER 3

JURISDICTION

Section 95-301. Jurisdiction of the district court.

95-302. Jurisdiction of the justice of the peace courts. 95-303. Jurisdiction of police and municipal courts.

95-304. State criminal jurisdiction.

95-301. Jurisdiction of the district court. The district courts have jurisdiction of all public offenses not otherwise provided for.

History: En. 95-301 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-4917. See also Montana constitution, article VIII, section 11.

Cross-References

District courts, jurisdiction and powers, Mont. Const. Art. VIII, § 11.

Collateral References

Criminal Law 286.

22 C.J.S. Criminal Law § 122.

21 Am. Jur. 2d 400 et seq., Criminal Law, § 378 et seq.

Power of trial court or judge to revoke order granting new trial in criminal case. 145 ALR 400.

95-302. Jurisdiction of the justice of the peace courts. The justices' courts have:

- (a) Jurisdiction of all misdemeanors punishable by a fine not exceeding five hundred dollars (\$500.00) or imprisonment not exceeding six (6) months, or both such fine and imprisonment; excluding jurisdiction in cases commenced under the Montana Dangerous Drug Act except to act as examining and committing courts and to conduct preliminary hearings as provided in subsection (e).
- (b) Concurrent jurisdiction, with district courts, of all misdemeanors punishable by a fine only, not exceeding fifteen hundred dollars (\$1,500.00); and
- (c) Jurisdiction to act as examining and committing courts and for such purpose to conduct preliminary hearings.

History: En. 95-302 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 11, Ch. 314, L. 1969.

Source: Revised Codes of Montana 1947, section 94-4916. See also, Montana constitution, article VIII, section 21.

Cross-References

Dangerous drug act, 54-129 to 54-138.

Enlargement of Jurisdiction by Implication

Statute providing for penalty assessments in addition to statutory limitations on the imposition of fines was void for indirectly enlarging the jurisdiction of the justice and police courts as prescribed by statutes defining jurisdiction of such courts in terms of maximum fine which may be imposed for the offense charged, notwithstanding state's argument that the jurisdiction had been enlarged by implication, rejected by court for the reason that such a serious governmental function as jurisdiction of the courts specially provided for in constitutional terms is not so easily amended by the theory of implication.

State ex rel. Sanders v. City of Butte, 151 M 171, 441 P 2d 190.

Exclusive Jurisdiction

Former provision, together with the provisions of sections 11 and 21 of article VIII of the constitution, under authority of which it was enacted, apparently reposed in justice courts exclusive original jurisdiction of all misdemeanors unless a law specifically provided that the district court should have jurisdiction or fix the penalty above the justice court maximum. Ex parte Sheehan, 100 M 244, 251, 49 P 2d 438.

Legislature's Authority

Within constitutional limitations, legislature may confer jurisdiction in any class of cases on either the district courts or justice's courts. State v. Holt, 121 M 459, 194 P 2d 651.

Unlicensed Practice of Medicine

Justice court did not have jurisdiction of prosecution for practicing medicine without license, bearing maximum punishment of \$1,000 fine or one year's imprisonment. State ex rel. Freebourn v. District Court, 105 M 77, 69 P 2d 748.

Collateral References

Criminal Law 90 (2). 22 C.J.S. Criminal Law § 125. $47~\mathrm{Am}.$ Jur. 2d 947, Justices of the Peace, $\S~49.$

Justice of the peace as a person in authority within rule excluding confession made under promise of immunity by person in authority. 7 ALR 431.

DECISIONS UNDER FORMER LAW

Appointed Counsel

An indigent charged with the crime of petit larceny, specifically enumerated in former section, is not entitled to court-appointed counsel, and since district court had no jurisdiction over justice court to appoint counsel for indigent defendant, attorney was not entitled to compensation. State ex rel. Johnson v. District Court, 147 M 263, 410 P 2d 933.

Common Nuisance (Liquor) Prosecution

In a prosecution for maintaining a common nuisance under section 19, Chapter 9, Extraordinary Session of 1921 (since repealed), made supplemental to and a part of the laws relating to intoxicating liquors, held that the district court had original jurisdiction, under section 37 of the Enforcement Act (Chapter 143, Laws 1917) (since repealed), conferring upon the district court original jurisdiction for violations of liquor laws and continued in force by Chapter 9, notwithstanding the offense is made a misdemeanor by section 19 thereof, punishable by a fine not exceeding \$500 and imprisonment in the county jail for not exceeding six months, and therefore otherwise triable in a justice court under this section. State v. Bowker, 63 M 1, 4, 205 P 961; State v. Sorenson, 65 M 65, 69, 210 P 752.

- 95-303. Jurisdiction of police and municipal courts. (a) The police courts have criminal jurisdiction as authorized by sections 11-1602 and 11-1603.
- (b) Municipal courts have criminal jurisdiction as authorized by section 11-1702.

History: En. 95-303 by Sec. 1, Ch. 196, L. 1967.

Cross-References

Police and municipal courts, creation and jurisdiction, Mont. Const. Art. VIII, § 24.

Jurisdiction of Police Court

City police court had jurisdiction of defendant, arrested by a city police officer

without a warrant, while driving on city streets, and promptly taken to the city police court where the arresting officer reported and charged defendant with operating a motor vehicle within the corporate limits of the city while under the influence of intoxicating liquor, in violation of city ordinance. City of Bozeman v. Ramsey, 139 M 148, 362 P 2d 206, 215.

- 95-304. State criminal jurisdiction. (a) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:
- (1) The offense is committed either wholly or partly within the state; or
- (2) The conduct outside the state constitutes an attempt to commit an offense within the state, and an act in furtherance of the offense occurs in the state; or
- (3) The conduct within the state constitutes an attempt, solicitation or conspiracy to commit in another jurisdiction an offense under the laws of this state and such other jurisdiction.
- (b) An offense is committed partly within this state, if either the conduct which is an element of the offense, or the result which is an element, occurs within the state. In homicide, the "result" is either the

physical contact which causes death, or the death itself, and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

- (c) An offense which is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.
- (d) This state includes the land and water and the air space above such land and water with respect to which the state has legislative jurisdiction.

History: En. 95-304 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The purpose of this section is to establish a broad grant of jurisdiction for all crimes.

The phrase "partly within this state" as used in subsection (a) (1) and (b) encompasses all offenses commenced outside and consummated within this state; offenses commenced within and consummated outside this state; and, offenses in which some elements take place within the state.

The section makes no distinction between a principal and an accessory for purposes of jurisdiction.

Subsection (d) claims for the state of Montana the maximum territorial jurisdiction compatible with federal claims.

Cross-References

District courts, jurisdiction and powers, Mont. Const. Art. VIII, § 11.

Federal jurisdiction, secs. 83-103 et seq. Jurisdiction of Indian country, secs. 83-801 et seg.

Territorial jurisdiction, limitations on, sec. 83-102.

Tribal Indians

The state has jurisdiction over Indian wards for crimes committed by them within the state but without the bounds of "Indian country." Buckman v. State, 139 M 630, 366 P 2d 346; In re Diserly's Petition, 140 M 219, 370 P 2d 763.

Crimes committed by Indians within Montana, but without the bounds of "Indian country" are within the jurisdiction of the state courts. Petition of Fox, 141 M 189, 376 P 2d 726, 727.

Tribal Indians-Forgery

State court had jurisdiction of prosecution of tribal Indian for forgery of check obtained from Indian agency office where check was cashed in a town outside of the boundaries of the Indian reservation. Petition of Fox, 141 M 189, 376 P 2d 726, 727.

Tribal Indians-Larceny

State court presumptively had jurisdiction of prosecution of tribal Indian charged

with larceny of a horse from Indian land where accused did not show that entire asportation took place on Indian land. State v. Akers, 106 M 43, 58, 74 P 2d 1138.

Tribal Indians-Statutory Rape

State court properly entertained jurisdiction of prosecution for crime committed by tribal Indian against Indian girl while off reservation, as against contention that federal court had exclusive jurisdiction of the offense. State v. Youpee, 103 M 86, 91, 61 P 2d 832.

Variance between Pleading and Proof

Under former statutes permitting conviction in any county into which the guilty person takes stolen property, there was no variance between the venue as laid in an information charging larceny of horses in a certain county of this state and proof that the horses were stolen in Canada and driven into said county. State v. De Wolfe, 29 M 415, 421, 74 P 1084, overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Collateral References

Criminal Law 92, 97 (1). 22 C.J.S. Criminal Law §§ 127, 134. 21 Am. Jur. 2d, Criminal Law, p. 244 et seq., § 191 et seq.; p. 404, §§ 385, 386.

Conviction or acquittal under Federal statute as bar to prosecution under state or territorial statute, or vice versa. 16 ALR 1231; 22 ALR 1551 and 48 ALR 1106.

Dismissal, nolle prosequi, or mistrial after change of venue in criminal case, as affecting jurisdiction or power of courts of respective districts as to subsequent proceedings. 18 ALR 714.

Absence from state at time of offense as affecting jurisdiction of offense. 42 ALR 272.

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed. 43 ALR 545.

Cheek, note, etc., or signature thereon, venue or jurisdiction of criminal prosecution predicated upon fraudulent obtaining of, from the person executing the same. 141 ALR 239.

VENUE 95-401

Person who steals property in one state or county and brings it into another as subject to prosecution for larceny in latter. 156 ALR 862.

Jurisdiction of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child. 44 ALR 2d 886.

CHAPTER 4

VENUE

Section 95-401. Place of trial.

Where offense committed partly in one and partly in another county. 95-402.

95-403. Where offense committed on or near county boundary.

95-404. Where a person in one county commits or aids and abets the commission of an offense in another county.

95-405. Offenses committed while in transit.

95-406. Death and cause of death in different places.

95-407. Offense commenced outside the state.

95-408. Stolen property.

Treason.

Escape from prison. 95-409. 95-410.

Bigamy. 95-411. Kidnaping. 95-412.

95-401. Place of trial. In all criminal prosecutions the trial shall be in the county where the offense was committed unless otherwise provided by law. All objections to improper place of trial are waived by a defendant unless made before trial. If an objection is made a hearing shall be held and the venue established before proceeding to trial.

History: En. 95-401 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The place of trial is fixed by the Montana constitution, article III, section 16. The place of trial, however, is subject to change for prejudice. See section 95-1710, Change of Place of Trial.

If an objection to venue is made, and it is shown that the offense occurred in a different county, or there is cause for the change, then the proceeding will be dismissed in that county. The same proceeding should be reinstated in the proper county.

In this code, venue and jurisdiction are completely separated. Venue is a constitutional right which may be waived, while jurisdiction is the power of the court to act and may not be waived.

Failure by the defendant to object to venue before trial is a waiver. This requires the defense to forewarn the prosecution that it plans to contest venue so that a legitimate determination of venue can be made before the trial.

Venue falls within that class of constitutional rights of the defendant which may be waived either by affirmative action, or through failure to object at the proper time. As such, venue should not be regarded as an absolute right, for not only may it be waived, but upon proper

motion by either the state or defendant the place of trial may be changed by proving the existence of prejudice. Thus, venue is not an essential element of the actual trial, to be proved beyond a reasonable doubt. Instead, the determination of the correct place of trial is a pre-trial procedure principally for the benefit and convenience of the parties involved.

Cross-References

Place of trial, Mont. Const. Art. III,

Information

An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient, it not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county. Judicial notice may be taken of the fact that the reservation in question is situated in Missoula county. State v. Tully, 31 M 365, 369, 78 P 760.

Venue Allegations

Information alleging that homicide was committed in Missoula county was sufficient as to venue, it being unnecessary to allege that crime occurred on Fort Missoula military reservation located within county. State v. Tully, 31 M 365, 78 P 760.

95-402. Where offense committed partly in one and partly in another county. Where two (2) or more acts are requisite to the commission of any offense, the trial may be in any county in which any of such acts occur.

History: En. 95-402 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision allows the trial to take place in the most convenient county where an element of the offense occurred. It does not matter if the final consummation of the offense occurred in another county. The only elements of the crime which are of interest are those acts constituting or requisite to the consummation of the offense; the trial of the case may be held in any county in which such acts occur.

In General

Where defendants, president and cashier of a bank, prepared an alleged false report to the superintendent of banks in P. county and transmitted it by mail to the superintendent of banks in L. & C. county, the district court of the former county had jurisdiction. State v. Cassill, 70 M 433, 227 P 49.

Collateral References

Criminal Law = 108 (1), 112.

22 C.J.S. Criminal Law §§ 174, 175, 177, 185.

21 Am. Jur. 2d 419, Criminal Law, § 403.

Constitutionality of statute fixing venue of offense committed while upon a public conveyance, or at a station or depot upon the route thereof. 11 ALR 1020.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of the same property. 19 ALR 636.

Libel in newspaper, venue of criminal prosecution for. 37 ALR 908 and 148

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed. 43 ALR 545.

Continuous transaction constituting a complete offense in each county or district as constituting more than one offense. 73 ALR 1511.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed. 76 ALR 1034.

Construction and effect of statutes providing for venue of criminal case in either county, where crime is committed partly in one county and partly in another. 30 ALR 2d 1265.

95-403. Where offense committed on or near county boundary. Where an offense is committed on or within one-half $(\frac{1}{2})$ mile of the boundary of two (2) or more counties, and it cannot be readily determined in which county the offense was committed, the offender may be tried in any of such counties.

History: En. 95-403 by Sec. 1, Ch. 196, L. 1967.

Judicial Notice as to Location

Courts will take judicial notice of the fact that a point located a given number of miles from a named town is in a certain county, hence that a point 25 miles north of

Brockton is in Roosevelt county. State v. Akers, 106 M 43, 58, 74 P 2d 1138.

Collateral References

Criminal Law 111.

22 C.J.S. Criminal Law § 178.

21 Am. Jur. 2d 420, Criminal Law, § 404.

95-404. Where a person in one county commits or aids and abets the commission of an offense in another county. Where a person in one county commits, aids, abets or procures the commission of an offense in another county the offender may be tried in either county.

History: En. 95-404 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section eliminates the distinction between principal and accessory for purposes of venue.

Cross-References

Indictment or information against accessory to felony, sec. 94-6424.

Collateral References

Criminal Law 110. 22 C.J.S. Criminal Law § 184. VENUE 95-408

95-405. Offenses committed while in transit. If an offense is committed in, on or against any instrument of conveyance passing within this state, and it cannot readily be determined in which county the offense was committed, the offender may be tried in any county through which such instrument of conveyance has passed or in the county where the travel terminates.

History: En. 95-405 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The term "instrument of conveyance" includes all modes of transportation.

Collateral References

21 Am. Jur. 2d 421, Criminal Law, § 405.

95-406. Death and cause of death in different places. If cause of death is inflicted in one county and the death ensues in another county, the offender may be tried in either county.

History: En. 95-406 by Sec. 1, Ch. 196, L. 1967.

Variance between Pleading and Proof

Under former section requiring trial of homicide in county where fatal injury was inflicted, held that, where a person is shot in one county but dies in another, and defendant is charged with murder in the former county, it is unnecessary to allege where the deceased died; and, though it is alleged that he died in the county where the fatal shot was fired, while the evidence shows that he died in another county, there is no variance. That term refers to a disagreement between the allegations in the information and the proof, with reference to some matter that is legally essential to the charge. State v. Crean, 43 M 47, 54, 114 P 603.

Collateral References

21 Am. Jur. 2d 410, Criminal Law, § 392.

95-407. Offense commenced outside the state. If the commission of an offense commenced outside the state is consummated within this state, the offender shall be tried in the county where the offense was consummated.

History: En. 95-407 by Sec. 1, Ch. 196,

Source: Illinois Code of Criminal Procedure, Chapter 38, section 1-6(d).

Variance between Pleading and Proof

There was no variance between information charging larceny of horses in Cascade county and proof that horses were stolen in Canada and driven into Cascade county. State v. De Wolfe, 29 M 415, 74 P 1084, overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Collateral References

Criminal Law 97 (1). 22 C.J.S. Criminal Law § 134. 21 Am. Jur. 2d 404, 410, Criminal Law, §§ 385, 386, 392.

95-408. Stolen property. Where a person obtains property by larceny, robbery, false pretenses or embezzlement, he may be tried in any county in which he exerted control over such property.

History: En. 95-408 by Sec. 1, Ch. 196, L. 1967.

Animal Driven into Another County

While jurisdiction in prosecution for larceny of livestock is determined by place where crime is committed, where property is taken in one county and thereafter brought into another, jurisdiction under this section is in either county; held, in case of concerted plan to steal horses and ship out of state by railroad, there was continuous commission of the crime from place of taking to destination, even though defendant's active participation ceased at a place between, and county into which animal driven had jurisdiction. State v. Akers, 106 M 43, 58, 74 P 2d 1138.

Judicial Notice as to Location

Courts will take judicial notice of the fact that a point located a given number of miles from a named town is in a certain county, hence that a point 25 miles north of Brockton is in Roosevelt county. State v. Akers, 106 M 43, 58, 74 P 2d 1138.

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overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Collateral References

22 C.J.S. Criminal Law § 185 (18). 21 Am. Jur. 2d 410, Criminal Law, § 392.

DECISIONS UNDER FORMER LAW

Constitutionality

Former provision which also provided for apportioning costs held not unconstitutional as being in conflict with section 27 of article III, the due process clause, section 4 of article XII, prohibiting the legislature from levying taxes upon the inhabitants or property in, inter alia, counties for county purposes, nor open to objection that it violated section 23 of article V, prohibiting more than one subject in a legislative bill and requiring that it be expressed in its title. Rosebud County v. Flinn, 109 M 537, 539, 543, 98 P 2d 330.

"Larceny"

"Larceny," as used in predecessor section meant grand larceny, the title of the act referring to property feloniously taken characterizing that crime as a felony. Rosebud County v. Flinn, 109 M 537, 541, 98 P 2d 330.

Meaning of Words "Prosecution" and "Costs"

Under former provision which also provided for apportioning costs of prosecution and trial, held that apparently only one construction could be given to section 8 of article III and section 27 of article VIII of the constitution of Montana, and former section 94-6201 appearing to have defined the meaning of the term "prosecution," namely, that the prosecution commences with the filing of the information or indictment, and not before. The section, where it used the term "costs," meant any legal and proper costs of prosecution and trial after filing of the information, including cost and expense of investigation and production of evidence. Costs incurred preliminary to filing the information were not proper claims against county where offense committed. Rosebud County v. Flinn, 109 M 537, 541, 98 P 2d 330.

95-409. Escape from prison. A person who escapes from prison may be tried in any county in the state.

History: En. 95-409 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-5611.

Collateral References

22 C.J.S. Criminal Law §§ 174 et seq., 185 (12).

95-410. Bigamy. A person who commits the offense of bigamy may be tried in any county where the bigamous marriage or bigamous cohabitation has occurred.

History: En. 95-410 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 1-6(h).

Collateral References

22 C.J.S. Criminal Law § 185 (7).

95-411. Kidnaping. A person who commits the offense of kidnaping may be tried in any county in which his victim has traveled or has been confined during the course of the offense.

History: En. 95-411 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 1-6(i).

Collateral References

22 C.J.S. Criminal Law § 185 (3). 21 Am. Jur. 2d 410, Criminal Law, § 392.

95-412. Treason. A person who commits the offense of treason may be tried in any county.

History: En. 95-412 by Sec. 1, Ch. 196, Source: Illinois cedure, Chapter 3

Source: Illinois Code of Criminal Procedure, Chapter 38, section 1-6(k).

CHAPTER 5

COMPETENCY OF ACCUSED

Section 95-501. Mental disease or defect excluding responsibility.

95-502. Evidence of mental disease or defect admissible when relevant to ele-

ment of the offense.

Mental disease or defect excluding responsibility is affirmative de-95-503. fense—requirement of notice—form of verdict and judgment when finding of irresponsibility is made.

Mental disease or defect excluding fitness to proceed. 95-504.

Psychiatric examination of defendant with respect to mental disease or defect.

95-506. Determination of fitness to proceed-effect of finding of unfitnessproceedings if fitness is regained.

95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony

when issue of responsibility is tried.

95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge.

95-509. Statements for purposes of examination or treatment inadmissible ex-

cept on issue of mental condition.

95-501. Mental disease or defect excluding responsibility. (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

As used in this chapter, the terms "mental disease or defect" does not include an abnormality manifested only by re-repeated criminal or otherwise antisocial conduct.

History: En. 95-501 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides as simple and as positive a test as is possible at the present time for separating the mentally irresponsible from the "criminal" without the invitation to the abuse of the "defense of insanity" that is inherent in the indefinite language of many tests of criminal responsibility.

While it recognizes the objective of the more modern tests that lack of understanding and lack of control need not be total in order to excuse, and that the question is one of degree, yet it does not excuse (as does the Model Penal Code rule), for a "substantial impairment" of either of these capacities. Rather in order to excuse, the impairment must be so great that the trier of fact can say that the accused was unable to appreciate the criminality of his conduct, or that he was unable to conform his conduct to the requirements of society.

This section is intended to expand the application of the existing Montana law to include any psychical abnormalities or subnormalities such as emotional deficiencies that have reached the dimension

that they can be termed mental diseases or defects and not otherwise. The section expands the application of existing Montana law.

The breadth of the test of mental disease or defect should be read in conjunction with section 95-507, which leaves control of the accused, if judged mentally deficient, entirely in the hands of the court. A defendant, if acquitted on the ground of mental disease or defect, will be committed to the Montana State Hospital, and cannot be discharged without leave of the committing court. This provision should prevent spurious defenses.

Source: Model Penal Code, section 4.01.

Cross-References

Who are capable of committing crimes, sec. 94-201.

Irresistible Impulse

"One may have mental capacity and intelligence sufficient enough to distinguish between right and wrong with reference to the particular act, and to understand the consequences of its commission, and yet be so far deprived of volition and self control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong." State v. Peel, 23 M 358, 369, 59 P 169.

Collateral References

Test of present insanity preventing trial or punishment. 3 ALR 94.

95-502. Evidence of mental disease or defect admissible when relevant to element of the offense. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

History: En. 95-502 by Sec. 1, Ch. 196, L. 1967.

- 95-503. Mental disease or defect excluding responsibility is affirmative defense—requirement of notice—form of verdict and judgment when finding of irresponsibility is made. (a) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.
- (b) (1) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may, for good cause, permit, files a written notice of his purpose to rely on such defense.
- (2) The defendant shall give similar notice when in a trial on the merits, he intends to rely on a mental disease or defect, to prove that he did not have a particular state of mind which is an essential element of the offense charged. Otherwise, except on good cause shown, he shall not introduce in his case in chief, expert testimony in support of that defense.
- (c) When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

History: En. 95-503 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The defendant is required to establish the defense of insanity by a preponderance of the evidence.

Notice is required to avoid surprise and to encourage a fair determination of the issues by a knowledgeable presentation of the facts and issues by both prosecutor and defense counsel. Defendant's failure to give the required notice, in advance of the trial, precludes the use of this defense. However, the judge has the discretion to allow such notice at a later time.

If the defendant fails to give notice of his intent to rely on a defense of lack of specific intent he does not lose that defense, but he will be limited to "lay" testimony which generally is not effective for a defense of mental disease or defect. But, if the state introduces expert testimony in rebuttal, then the defendant is allowed the same kind of testimony in his rebuttal. The desirability of giving

the trial judge the power to raise the defense of irresponsibility in a proper case, where the defendant refused to permit his counsel to do so, was considered but was omitted as being too great an interference with the conduct of the defense. However, it may be considered by the judge in determining the defendant's fitness to proceed. The purpose of the language in subdivision (c) is to establish a basis for commitment of a defendant acquitted of the crime charged on the ground of mental disease or defect. The commitment would be to the proper state institution rather than to prison. For details of the commitment procedure, see section 95-508 infra.

Source: Model Penal Code, section 4.03.

Cross-References

How insanity must be proven, sec. 94-119.

Collateral References

21 Am. Jur. 2d 116 et seq., Criminal Law, § 31 et seq.

95-504. Mental disease or defect excluding fitness to proceed. No person who as a result of mental disease or defect is unable to understand the proceedings against him or to assist in his own defense, shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

History: En. 95-504 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The standard established by this section for fitness to proceed is the most widely accepted of all the standards now being used. The prior Montana section merely referred to "insanity" but was interpreted in case law to mean the same as the language of this section. See State v. Kitchens, 129 M 331, 286 P 2d 1079 (1955) interpreting R. C. M. 1947, section 94-9301. Thus, the defendant's capacity to understand and defend must be determined prior to trial. Defendant's fitness to proceed is determined by the court based on either the psychiatric report

provided for in section 95-505 or upon a separate hearing. The procedure for determining fitness to proceed and all related steps are set out in section 95-506.

Source: Model Penal Code, section 4.04.

Declaratory of Common Law

Provision that an insane person cannot be tried or punished held declaratory of the common law as it had existed at least since Blackstone's day. State v. Kitchens, 129 M 331, 286 P 2d 1079, 1083.

Collateral References

Criminal Law \$625, 981 (1). 23 C.J.S. Criminal Law \$940; 24 C.J.S. Criminal Law §§ 1569, 1619.

95-505. Psychiatric examination of defendant with respect to mental disease or defect. (a) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one (1) qualified psychiatrist or shall request the superintendent of the Montana state hospital to designate at least one (1) qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty (60) days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

- (b) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.
 - (c) The report of the examination shall include the following:
 - (1) A description of the nature of the examination;
 - (2) A diagnosis of the mental condition of the defendant;
- (3) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense:
- (4) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed (in triplicate) with the clerk of court, who shall cause copies to be delivered to the county attorney and to counsel for the defendant.

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides for a single psychiatric examination of the defendant to determine the issues of: (a) mental disease or defect as an affirmative defense; (b) competency of the defendant to stand trial; and (c) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged. This avoids the need for a separate psychiatric examination on each issue.

Subdivision (a) contains alternative methods for designating the examining psychiatric experts, depending on the varying conditions. The court retains the power to select experts of its own choosing. This provision allowing a psychiatrist retained by the defendant to witness and

participate in the psychiatric examination is designed to assure the defendant an expert of his own choice. This arrangement may be of considerable value in avoiding the so-called battle of experts.

The second paragraph in subdivision (c) is correlated with section 95-509 on how much of the communication with the psychiatric examiner will be privileged. If the statements made by the defendant to the psychiatric examiner are not privileged, the defendant may be cautioned by his lawyer not to answer any questions, thus making the examination difficult if not impossible.

Source: Model Penal Code, section 4.05.

Collateral References

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 ALR 2d 434.

- 95-506. Determination of fitness to proceed—effect of finding of unfitness—proceedings if fitness is regained. (a) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the county attorney nor counsel for the defendant contests the finding of the report filed pursuant to section 95-505, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the parties shall have the right to summon and cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.
- (b) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (c) of this section, and the court shall commit him to the custody of the superintendent of the Montana state hospital, to be placed in an appropriate institution of the state department of public institutions for so long as such unfitness shall endure. When the court, on its own motion or upon the application of the superintendent of the Montana state hospital, or the county attorney, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the

commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the state department of public institutions.

(c) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section adopts the growing minority position of excluding a jury trial on the issue of fitness to proceed. The court makes this determination based on either the psychiatric examination conducted under section 95-505 or by a separate hearing. If the report from section 95-505 is used, the defendant may summon the experts who conducted the examination and cross-examine them and offer other evidence on the question.

Subdivision (b) provides that a hearing

Subdivision (b) provides that a hearing is necessary to determine if the defendant has regained fitness to proceed. All interested parties have a right to move for a hearing to have the proceedings re-

sumed.

The provision permitting the court to dismiss the prosecution, if because of the lapse of time it would be unjust to continue it, is novel in codified American law but not in actual practice. The result is usually reached at the discretion of the county attorney through the entry of a nolle prosequi. However, this plea is not available in Montana.

Subdivision (c) authorizes the judge to rule on any objection which might be raised by counsel prior to trial. The primary purpose is to relieve the defendant of a pending criminal charge in those cases in which the charge could be dismissed prior to trial but for the defendant's mental condition. It is not intended to jeopardize the defendant's legal position while the defendant remains unfit to proceed to trial. The defendant might receive an unfavorable ruling based on a legal objection made by his counsel while he is unfit to proceed to trial and mentally incapable to assist in his defense. However, since the determination could only be made on those matters which are "susceptible of a fair determination without the personal participation of the defendant" nothing is lost that would not otherwise be lost. The case remains in the hands of "defense counsel."

Source: Model Penal Code, section 4.06.

Collateral References

Criminal Law \$\infty\$625.

23 C.J.S. Criminal Law § 940.

21 Am. Jur. 2d 116 et seq., Criminal Law, § 31 et seq.

Test of present insanity preventing trial or punishment. 3 ALR 94.

Constitutionality of statutes relating to determination of plea of insanity in criminal case. 67 ALR 1451.

Investigation of present insanity to determine whether accused should be put, or continue, on trial. 142 ALR 961.

Presumption of continuing insanity as

Presumption of continuing insanity as applied to accused in criminal case. 27 ALR 2d 121.

DECISIONS UNDER FORMER LAW

Sanity Formerly Jury Question

Where the question of the defendant's present sanity is presented, it is within the sound discretion of the court to determine whether the matter should be inquired into in a special proceeding, whereas the question of the defendant's sanity at the time of the commission of the offense should be tried by the jury impaneled to pass upon his guilt or innocence of the crime charged. State v. Peterson, 24 M 81, 60 P 809.

The doubt as to accused's sanity at time of trial, mentioned in former section authorizing special proceeding to determine sanity, was one arising in the mind of the presiding judge, and was to be left to his judicial conscience. Unless there was a doubt in the mind of the judge a quo—a doubt which he must legally determine as he would determine any other matter of grave import before him—he was not warranted in calling a special jury to try the issue. State v. Howard, 30 M 518, 528, 77 P 50.

Under former sections making sanity a jury question, held that where, after death sentence has been pronounced, there is good reason to suppose that accused has become insane, the sheriff, with the con-

currence of the judge of the court by which the judgment was rendered, may summon a jury to inquire into the question of his sanity in conformity with former sections; but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the special sanity proceeding must be held. State v. Vettere, 77 M 66, 249 P 666.

Where in a prosecution for homicide no attempt was made to prove insanity and the question of defendant's sanity during the trial or at any time was not suggested to the court, failure of the court to call a jury to determine his sanity, a matter addressed to its sound discretion, was not an abuse thereof. State v. Schlaps, 78 M 560, 575, 254 P 858.

-Construction of Former Statute

A doubt as to accused's sanity at time of trial (within former section providing for issue to be determined by jury in special proceeding) may come from matters which are brought to attention of trial judge wholly beyond the common-law record or which although occurring at trial

do not appear in the record, or which although shown in the record are not admissible as evidence. State v. Kitchens, 129 M 331, 286 P 2d 1079, 1083.

The question whether a doubt as to accused's sanity at time of trial is raised in any given case addresses itself directly to trial court's discretion. Its abuse will be reviewed on appeal, and where an abuse does appear, the reviewing court will say as a matter of law a doubt did arise requiring that special proceeding be held. State v. Kitchens, 129 M 331, 286 P 2d 1079, 1083.

The weight of successive adjudications by four different courts and judges, in other proceedings, that the defendant was insane, were sufficient as a matter of law to raise doubt as to his sanity at time of trial and to require special sanity proceeding. The testimony of a witness that the defendant was sane does not alter the case, for at this stage of the proceedings the court is only concerned with the preliminary question whether there is reason to doubt defendant's sanity. State v. Kitchens, 129 M 331, 286 P 2d 1079, 1085.

- 95-507. Determination of irresponsibility on basis of report—access to defendant by psychiatrist of his own choice—form of expert testimony when issue of responsibility is tried. (a) If the report filed pursuant to section 95-505 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that such mental disease or defect was sufficient to exclude responsibility, the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.
- (b) When either the defendant or the state wishes the defendant to be examined by a qualified psychiatrist or other expert, selected by the one proposing the examination, such examiner shall be permitted to have reasonable access to the defendant for the purpose of such examination.
- (c) Upon the trial, any psychiatrist who reported pursuant to section 95-505 may be called as a witness by the prosecution or by the defense. If the issue is being tried before a jury, the jury shall not be informed that the psychiatrist was designated by the court or by the superintendent of the Montana state hospital. Both the prosecution and the defense may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant shall be competent to testify to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by another witness.
- (d) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to

make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the offense charged. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the yalidity of his diagnosis or opinion.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Under subdivision (a) in cases of extreme mental disease or defect where the exclusion of responsibility is clear, trial can be avoided and the defendant immediately committed as irresponsible. This provision also vests the court with the power and responsibility for the disposition of the defendant. Under prior Montana law the matter was determined by a jury trial.

Subdivision (b) allows both the prosecution and the defense access to the defendant for purposes of psychiatric examinations. The sheriff or warden must make the defendant accessible for such examinations. The number of times the defendant must be made accessible for such examinations will rest in the discretion of the court.

Subdivision (c) of the Model Penal Code was altered to prevent the psychiatric examiner, who conducted the examination under section 95-505 from being presented to the jury as "court-appointed." The second sentence in subdivision (c) eliminates the use of the often abused hypothetical question. Since both the prosecution and the defense can directly examine the defendant, the use of the hypothetical question would be greatly

limited even without this provision. However, there may be instances when either party would like to continue this "objectionable" practice. The second sentence also allows either side to call additional expert witnesses to testify as to the procedure used or the general scientific propositions stated by the examining psychiatrists. But, observations of the defendant in court are not a sufficient basis for a psychiatrists's opinion as to the defendant's mental condition.

Subdivision (d) is an attempt to meet

Subdivision (d) is an attempt to meet some of the valid procedural objections of the psychiatric experts who have expressed great dissatisfaction with the manner in which they are allowed to testify when called as an expert in a criminal trial. This provision goes considerably farther than existing legislation in assuring that a psychiatric expert who has examined the defendant will have an adequate opportunity to state and explain his diagnosis of the defendant's mental condition at the time of the conduct charged, and give his opinion as to the extent of the defendant's mental impairment at that time, without being restricted to the latter testimony alone and without having to state his opinion in hypothetical form. He is, of course, subject to cross-examination as to the basis for his opinion.

Source: Model Penal Code, section 4.07.

95-508. Legal effect of acquittal on the ground of mental disease or defect excluding responsibility—commitment—release or discharge. (a) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care and treatment.

(b) If the superintendent of the Montana state hospital believes that a person committed to his custody, pursuant to subsection (a) of this section, may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the county attorney of the county from which the defendant was committed. The court shall thereupon appoint at least two (2) qualified psychiatrists

to examine such person and to report within sixty (60) days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examinations and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the superintendent of the Montana state hospital as suitable for the temporary detention of irresponsible persons.

- (c) If the court is satisfied by the report filed pursuant to subsection (b) of this section, and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the court determines to be necessary, or shall be recommitted to the custody of the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.
- (d) If, within five (5) years after the conditional release of a committed person, the court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the court shall forthwith order him to be recommitted to the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.
- (e) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the superintendent of the Montana state hospital. However, no such application by a committed person need be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment, and if the determination of the court be adverse to the application, such person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The legal effect of acquittal on the ground of mental disease or defect excluding responsibility is characterized by (a) mandatory commitment of the defendant to an appropriate institution upon such an acquittal, (b) dangerousness to

himself or others as the criterion for continued custody, (c) power only in the committing court (other than as affected by habeas corpus) to discharge or release the defendant, (d) probationary release as an alternative to absolute discharge, (e) application for release or discharge to be made by the superintendent of the Montana State Hospital or by the defendant with limitations as to the fre-

quency of applications by the defendant. The provisions for automatic commitment are in accordance with the practice in England and a minority of American jurisdictions. It not only provides the public with the maximum immediate protection, but may also work to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury. It seems preferable to make dangerousness the criterion for continued custody rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal. The prescribed procedure protects both the public and the defendant by providing for an independent psychiatric examination of the defendant before action on the application for release, and then either for summary favorable action on the application or a full hearing. The provision for release on probation furnishes additional protection to the public in the case of those individuals who need some supervision upon their return to the community.

This provision gives the committing court the exclusive power (aside from

habeas corpus) to discharge or release the defendant. This law is much stricter than traditional laws in this area.

Although a few states have prescribed a minimum time the committed person must be kept in custody, and have restricted the frequency with which application for his release may be made, subdivision (e) allows the superintendent of the Montana State Hospital to make or renew such application at any time. Applications by the patient are limited by what is thought to be the period necessary to observe him initially (six months) and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year).

Source: Model Penal Code, section 4.08. Collateral References

Criminal Law € 625.

23 C.J.S. Criminal Law § 940. 21 Am. Jur. 2d 137 et seq., Criminal Law, § 55 et seq.

Remedy of one convicted while insane.

10 ALR 213 and 121 ALR 267. Constitutionality of statute which provides for commitment of accused acquitted on ground of insanity to hospital for insane without examination of present mental condition. 145 ALR 892.

Test or criterion of mental condition within contemplation of statute providing for commitment of persons because of mental condition. 158 ALR 1220.

Statements for purposes of examination or treatment inadmissible except on issue of mental condition. A statement made by a person subjected to psychiatric examination or treatment pursuant to sections 95-505, 95-506, 95-508 for the purposes of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition but it shall be admissible upon that issue, whether or not it would be otherwise deemed a privileged communication unless such statement constitutes an admission of guilt of the crime charged.

History: En. 95-509 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section embodies the view that the important expert knowledge of the mental condition of the defendant acquired by examination or treatment on order of the court should be fully available in evidence in any proceeding where his mental condi-tion may properly be in issue; but to safeguard the defendant's right and to make possible the feeling of confidence essential for effective psychiatric diagnosis or treatment, the defendant's statements made for this purpose may not be put in evidence on any other issue.

The provision covers not only statements made during a psychiatric examination but also statements made during treatment. These statements are only admissible on the issue of mental condition. This should make both the examination and treatment palatable to the defendant also expedite the work of the psychiatrist.

Source: Model Penal Code, section 4.09.

CHAPTER 6

ARREST

Section 95-601. Definitions.

95-602. Method of arrest.

95-603. Issuance and service of arrest warrant upon complaint.

95-604. Arrest with a warrant.

95-605. Procedure when warrant defective.

95-606. Arrest without a warrant. 95-607. Time of making arrest.

95-608. Arrest by a peace officer. 95-609. Assisting a peace officer.

95-610. Release by officer of person arrested.

95-611. Arrest by a private person.

95-612. When summons may be issued. 95-613. Effect of not answering summons.

95-614. Notice to appear.

95-615. Offenses committed by corporations.

95-616. Persons exempt from arrest. 95-617. Magistrate may order arrest.

95-618. Roadblocks.

95-619. Close pursuit—power of arrest by officers of another state.

95-601. Definitions. (a) Arrest Defined: An arrest is taking a person into custody in the manner authorized by law.

- (b) Warrant of Arrest: A warrant of arrest is a written order from a court directed to a peace officer, or to some other person specifically named, commanding him to arrest a person. This term includes the original warrant of arrest or a copy certified by the issuing court.
- (c) Summons: A summons is a written order issued by the court which commands a person to appear before a court at a stated time and place.
- (d) Notice to Appear: A notice to appear is a written direction issued by a peace officer that a person appear before a court at a stated time and place to answer an offense set forth therein.

History: En. 95-601 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The precise form of a warrant, a summons, and a notice to appear are detailed in forms which accompany the code.

Cross-References

Issuance of warrant upon failure to comply with conditions of bail, sec. 95-1107.

Collateral References

Criminal Law 218 (1-5). 22 C.J.S. Criminal Law §§ 321, 323-326. 5 Am. Jur. 2d 700 et seq., Arrest, § 7 et seq.

Arrest of one released on bail. 62 ALR 462.

- 95-602. Method of arrest. (a) An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.
- (b) All necessary and reasonable force may be used in making an arrest, but the person arrested shall not be subject to any greater restraint than is necessary to hold or detain him.
- (c) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

History: En. 95-602 by Sec. 1, Ch. 196, L. 1967. ARREST

Revised Commission Comment

The same amount of force authorized to gain entry is permissible to gain exit.

Use of Force

In making a lawful arrest, the officer may use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists, but if the officer unnecessarily assaults him, he is criminally liable for such assault. State v. Prlja, 57 M 461, 189 P 64.

Collateral References Arrest@=68.

6 C.J.S. Arrest §§ 11-16. 5 Am. Jur. 2d 774, et seq., Arrest, § 87

Degree of force that may be employed in arresting one charged with a misdemeanor. 3 ALR 1170 and 42 ALR 1200.

Warrant to search as necessary to justify search and seizure incident to lawful arrest. 32 ALR 680; 51 ALR 424; 74 ALR 1387 and 82 ALR 782.

Police officer's power to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 ALR 2d 1432.

- 95-603. Issuance and service of arrest warrant upon complaint. (a) A complaint, as the basis of an arrest warrant, shall be in writing.
- (b) When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine upon oath the complainant and may also examine any witnesses.
- (c) If it appears from the contents of the complaint and the examination of the complainant and other witnesses, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense a warrant shall be issued by the court for the arrest of the person complained against. In the discretion of the court or upon the request of the county attorney, a summons instead of a warrant shall issue. More than one (1) warrant or summons may issue on the same complaint.
 - (d) A warrant of arrest shall:
- (1) Be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;
 - (2) Set forth the nature of the offense:
- (3) Command that the person against whom the complaint was made be arrested and brought before the court issuing the warrant, or if he is absent or unable to act before the nearest or most accessible court in the same county. If an arrest is made in a county other than the one in which the warrant was issued the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made;
- (4) Specify the name of the person to be arrested or if his name is unknown, shall designate such person by any name or description by which he can be identified with reasonable certainty;
- (5) State the date when issued and the municipality or county where issued, and
 - (6) Be signed by the judge of the court with the title of his office.
 - (e) The warrant of arrest may specify the amount of bail.
- (f) The warrant shall be directed to all peace officers in the state. It shall be executed by a peace officer and may be executed in any county of the state. However, warrants issued for the violation of city ordinances

cannot be executed outside the city limits, except as otherwise provided by sections 11-927 and 11-960.

History: En. 95-603 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The purpose of a complaint at this point is to justify the issuance of an arrest warrant. Both an information, Chapter 13, and an indictment, Chapter 14, may also be used as the basis of an arrest warrant. The section requires the inclusion of a statement showing probable cause to believe that the accused has committed an offense. The purpose for including a statement of probable cause is not to charge an offense but rather to establish a basis for issuing the warrant of arrest.

Subdivision (f) omits as unnecessary the service of an arrest warrant by a private person. The section abolishes the distinction between issuing courts and allows any peace officer to whom a warrant is directed, to execute it in any place in the state.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-9.

Cross-References

Issuance of warrant upon failure to comply with conditions of bail, sec. 95-1107.

Setting and accepting bail under warrant of arrest, sec. 95-1104.

Extent of Examination before Issuing Warrant

Magistrate examining complaint need not go into matter as thoroughly as is required at trial. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

Peace Officer Defined

One acting under authority of the county attorney as special investigator of offenses against the narcotics law, who made an arrest without a warrant, held not a "peace officer" within the meaning of a former section providing that an arrest may be made by a peace officer or a private person. State v. Hum Quock, 89 M 503, 519, 300 P 220.

When Mandamus Lies to Compel Magistrate's Disposal

Held, on application for writ of mandamus to compel a justice of the peace to dispose of an accusation brought under section 94-1440, prohibiting an appointive state officer from being a member of a political committee, etc., that the writ will issue commanding the justice to take action by either issuing a warrant of arrest or dismissing the complaint where two weeks expired before examination of the accuser and two months in examining six witnesses to ascertain whether a violation was probable or not, but it will not issue to control his discretion, i.e., to issue a warrant of arrest. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

Where Warrant May Be Executed

The sheriff of Flathead county has authority to arrest person in Powell county under warrant issued in Flathead county upon such person's release from prison. Application of Campeau, 122 M 375, 209 P 2d 1012, 1013.

Collateral References

Criminal Law 208 et seq. 22 C.J.S. Criminal Law §§ 303-311, 317-321; 97 C.J.S. Witnesses § 22 et seq.

5 Am. Jur. 2d 706 et seq., Arrest, § 13 et seq.

Jurat to warrant, officer's failure to sign. 1 ALR 1574 and 116 ALR 589.

Who may make affidavit as basis for warrant of arrest. 16 ALR 923.
Authentication of warrant, formality

30 ALR 700.

Territorial extent of power to arrest under a warrant. 61 ALR 377.

DECISIONS UNDER FORMER LAW

Duty To Make Complaint

Former provision that a person who has reason to believe that a crime has been committed and that a certain person has committed it, must make complaint before a magistrate, did not require one to disclose to a county attorney evidence within his knowledge tending to disprove the defendant's guilt, and an instruction that it did was erroneous. State v. Jackson, 71 M 421, 434, 230 P 370.

95-604. Arrest with a warrant. When making an arrest by virtue of a warrant, the peace officer making the arrest shall inform the person to be arrested of his authority, of the intention to arrest him, of the cause of the arrest, and of the fact that a warrant has been issued for ARREST 95-607

his arrest, except when he flees or forcibly resists before the officer making the arrest has an opportunity so to inform him, or when the giving of such information will imperil the arrest. The peace officer making the arrest need not have the warrant in his possession at the time of the arrest, but after the arrest, if the person arrested so requests, the warrant shall be shown to him as soon as practicable.

History: En. 95-604 by Sec. 1, Ch. 196, L. 1967.

 $5~\mathrm{Am}.~\mathrm{Jur.}~2d~698$ et seq., Arrest, § 4 et seq.

Collateral References Arrest©=65. 6 C.J.S. Arrest § 4. Necessity of showing warrant upon making arrest under warrant. 40 ALR 62. Territorial extent of power to arrest under a warrant. 61 ALR 377.

95-605. Procedure when warrant defective. No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from such custody because of technical irregularities not affecting the substantial rights of the accused.

History: En. 95-605 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-10.

95-606. Arrest without a warrant. A peace officer or person making an arrest without a warrant must inform the person to be arrested of his authority, if any, of the intention to arrest him and the cause of the arrest, except when the person to be arrested is actually engaged in the commission of or in an attempt to commit an offense, or is pursued immediately after its commission, or after an escape, or when the giving of such information will imperil the arrest.

History: En. 95-606 by Sec. 1, Ch. 196, L. 1967.

Exception

Where officer is well known to those whom he seeks to arrest and where those parties, instead of surrendering as directed by officer, immediately prepare to fire upon him, ceremony of disclosing official character of officer and reason for arrest is voluntarily dispensed with by parties to be arrested. State v. Gay, 18 M 51, 44 P 411.

Privileged Entry Where No Arrest Warrant

Opening defendant's apartment door to limit of night latch to determine what had caused raging man to fall silent, which was reasonable ground to believe a necessity existed, was a privileged entry even though defendant could not have been arrested under the statutes in view of evidence that when the police arrived no disturbance was in progress, they had no warrant for the arrest of the defendant and they had at no time informed the defendant that they intended to arrest him. State v. Lukus, 149 M 45, 423 P 2d 49.

Collateral References

Arrest \$\\$ 5-10. 6 C.J.S. Arrest \$\\$ 5-10. 5 Am. Jur. 2d 711, Arrest, \\$ 22.

Constitutionality of statute authorizing arrest without warrant. 1 ALR 585.

Arrest without warrant for driving while intoxicated. 42 ALR 1512; 49 ALR 1400 and 68 ALR 1374.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 ALR 132.

Peace officer's delay in making arrest without warrant for misdemeanor or breach of peace committed in his presence. 58 ALR 1056.

Arrest without warrant on suspicion or information as to unlawful possession of weapons. 92 ALR 490.

Information, belief or suspicion as to commission of felony as justification for arrest by private person without warrant. 133 ALR 608.

Police officer's power to enter private house or inclosure to make arrest, without a warrant, for a suspected misdemeanor. 76 ALR 2d 1432.

95-607. Time of making arrest. An arrest may be made on any day and at any time of the day or night except that a person cannot be ar-

rested in his home or private dwelling place, at night, for a misdemeanor committed at some other time and place unless upon the direction of a magistrate endorsed upon a warrant of arrest.

History: En. 95-607 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision broadens the scope of arrests for misdemeanors and allows arrests for all misdemeanors at night, except that a person cannot be arrested at night in his home for a prior misdemeanor unless upon the direction of a magistrate endorsed upon a warrant of arrest. This restriction was imposed to prevent the police from harrassing a person or searching his home on the pretext of arresting him for a misdemeanor committed at some other time and place.

Collateral References

Arrest \$\infty 67.

6 C.J.S. Arrest § 12. 5 Am. Jur. 2d 765, Arrest, § 79.

Time at which arrest is made as affecting its legality or liability for making it. 9 ALR 1350.

95-608. Arrest by a peace officer. A peace officer may arrest a person when:

- He has a warrant commanding that such person be arrested, or (a)
- He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state, or
- He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another jurisdiction, or
- He believes on reasonable grounds, that the person is committing an offense, or that the person has committed an offense and the existing circumstances require his immediate arrest.

History: En. 95-608 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Revised Commission Comment

The section states the circumstances under which a peace officer may make an arrest for either a felony or a misdemeanor with or without an arrest warrant. It allows peace officers to arrest on a warrant which they do not have in their possession.

Subdivision (c) relating to arrests based on out-of-state warrants is limited to

felony warrants.

Subdivision (d) is the exclusive provision for arrests for either a felony or a misdemeanor without an arrest warrant. The scope of arrest for misdemeanors has been broadened to allow an arrest for a past misdemeanor not committed in the officer's presence under the prescribed circumstances. This may be done without an arrest warrant but must be based on a showing of probable cause and at night can only take place outside the person's home or dwelling as stated in section 95-607.

An arrest without a warrant may be made on reasonable ground to believe that the person has committed or is committing an offense, and does not require proof that "an offense has in fact been committed."

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-2.

Accused's Lack of Mens Rea

Under section 3200, R. C. M. 1921 (since repealed) the mere possession of narcotics was prima facie evidence of guilt and therefore lack of knowledge, on the part of the recipient of a package through the mails, that it contained morphine did not render her arrest unlawful, her lack in that respect being a matter of defense at the trial. State ex rel. Kuhr v. District Court, 82 M 515, 519, 268 P 501.

Peace Officer Defined

One acting under authority of the county attorney as special investigator of offenses against the narcotics law, who made an arrest without a warrant, held not a "peace officer" within the meaning of former arrest statutes. State v. Hum Quock, 89 M 503, 300 P 220.

Privileged Entry Where No Arrest War-

Opening defendant's apartment door to limit of night latch to determine what had caused raging man to fall silent, which was reasonable ground to believe a necessity existed, was a privileged entry even though defendant could not have been arrested under the statutes in view of evidence that when the police arrived no disturbance was in progress, they had no warrant for the arrest of the defendant and they had at no time informed the defendant that they intended to arrest him. State v. Lukus, 149 M 45, 423 P 2d 49.

Subsequent to Confession

Where defendant was requested to go to the sheriff's office for questioning and was not arrested until after his confession was given, the arrest without a warrant subsequent to the confession was a proper one within former section. State v. Nelson, 139 M 180, 362 P 2d 224, 229.

Unlawful Arrest

In action for damages for unlawful arrest which occurred after store manager handed plaintiff's check to officer and plaintiff seized check from officer's hand, arrest could not be justified by alleging a violation of sections 94-35-169 and 94-4202. Harrer v. Montgomery Ward & Co., 124 M 295, 221 P 2d 428, 435.

Use of Force To Arrest With and Without Warrant

95-611

Person named in warrant must submit even though not guilty of any offense; officer, after making his purpose known and exhibiting warrant, if asked to do so, may use such force as is necessary to make arrest without subjecting himself to charge of trespass; where arrest without warrant is not justified, such an arrest constitutes a trespass on the personal liberties of the one arrested, against which he may use such force as is necessary to prevent arrest or effect escape; in prosecution for resisting an officer, it is not sufficient that officer believed there was a violation of law, but it must appear that conditions described in statute governing arrest without warrant existed (applying former section 94-6003). State v. Bradshaw, 53 M 96, 161 P 710.

Collateral References

Arrest@=63 (1-4), 65; Criminal Law@= 218 (1).

6 C.J.S. Arrest §§ 4, 6.

5 Am. Jur. 2d, Arrest, p. 713 et seq., § 24 et seq.; p. 762 et seq., § 76 et seq.

- 95-609. Assisting a peace officer. (a) A peace officer making a lawful arrest may command the aid of male persons over the age of eighteen (18).
- (b) A person commanded to aid a peace officer shall have the same authority to arrest as that officer.
- (c) A person commanded to aid a peace officer in making an arrest shall not be civilly liable for any reasonable conduct in aid of the officer.

History: En. 95-609 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-8.

Collateral References

Arrest \$\infty\$69.

6 C.J.S. Arrest § 16.

5 Am. Jur. 2d 794, Arrest, § 115.

95-610. Release by officer of person arrested. A peace officer having custody of a person arrested without a warrant is authorized to release the person without requiring him to appear before a court when the officer is satisfied that there are no grounds for criminal complaint against the person arrested.

History: En. 95-610 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section enunciates the "station adjustment" doctrine of release by an officer who has made a legal arrest without a warrant but subsequently determines from

investigation that there is insufficient evidence for proceeding further with the criminal charge. This right of release does not excuse or free from civil responsibility, an officer who has made an illegal arrest.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-6.

95-611. Arrest by a private person. A private person may arrest another when:

- (a) He believes, on reasonable grounds, that an offense is being committed or attempted in his presence; or
- (b) When a felony has in fact been committed and he believes, on reasonable grounds, that the person arrested has committed it.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6004.

Authority To Arrest

The authority of a private person to make an arrest without a warrant is more limited than that of an officer to make a like arrest. State ex rel. Sadler v. District Court, 70 M 378, 386, 225 P 1000.

Determining Lawfulness of Arrest

While the legality of an arrest by a private person without a warrant cannot depend upon what is found in the possession of the person arrested, the fact that his belief that a crime was being committed is found to be correct accredits the belief and gives weight to the evidence upon which he acted. State v. Hum Quock, 89 M 503, 519, 300 P 220.

In determining whether a private person had "reasonable cause" for believing that a crime had been or was being committed in his presence when he made an arrest, under authority of predecessor section, without a warrant, a liberal rather than a strict course should be followed; if he acted in good faith and the facts and circumstances were such as to warrant a man of prudence and caution in believing as he did when making the arrest, it should be held lawful. State v. Hum Quock, 89 M 503, 519, 300 P 220.

False Imprisonment

In action for false imprisonment, it was proper to refuse the defendant an instruction to effect that law gives a private person the right to make an arrest when person arrested has committed, or is about to commit, a public offense in his presence, and that, if the jury believes that the plaintiff had taken from the defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, the verdict should be for the defendant. Kroeger v. Passmore, 36 M 504, 511, 93 P 805.

Probable Cause

To entitle a private person to make an arrest, for a public offense committed or attempted in his presence, the facts and circumstances must be such that upon them alone he would be justified in making a complaint upon which a warrant might issue, i.e., the facts and circumstances must be sufficient to warrant the conclusion that there is probable cause for believing that an offense is being committed. State ex rel. Sadler v. District Court, 70 M 378, 386, 225 P 1000.

Collateral References

Arrest \$\infty\$64.

6 C.J.S. Arrest § 8. 5 Am. Jur. 2d 726, Arrest, §§ 34-36.

Information, belief, or suspicion as to commission of felony, as justification for arrest by private person without warrant. 133 ALR 608.

DECISIONS UNDER FORMER LAW

Construction

Former section dealing with arrests by private persons was required to be read with and was limited by former section requiring the private person making the arrest to take the person arrested before a magistrate or deliver him to a police officer without unnecessary delay. Kroeger v. Passmore, 36 M 504, 93 P 805.

- 95-612. When summons may be issued. (a) When authorized to issue a warrant of arrest a court may in lieu thereof issue a summons.
 - The summons shall:
 - (1)Be in writing in the name of the state of Montana;
 - State the name of the person summoned and his address, if known;
 - Set forth the nature of the offense; (3)
- (4)State the date when issued, and the municipality or county where issued;

- (5) Be signed by the judge of the court with the title of his office; and
- (6) Command the person to appear before a court at a certain time and place.
- (c) The summons may be personally served in the same manner as the summons in a civil action.

History: En. 95-612 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Issuing a summons does not constitute an arrest. It is a courtesy substitute for

an arrest when the court, in its discretion, believes that the person can be relied upon to appear. It precludes the necessity of setting bail.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-11.

95-613. Effect of not answering summons. Upon failure of the person summoned to appear, the magistrate shall issue a warrant of arrest. If after issuing a summons the magistrate becomes satisfied that the person summoned will not appear as commanded by the summons he may at once issue a warrant of arrest.

History: En. 95-613 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision allows the magistrate to issue a warrant of arrest either before the time for the appearance stated in the summons or after the person fails to appear.

- 95-614. Notice to appear. (a) Whenever a peace officer is authorized to arrest a person without a warrant, he may instead issue to such person a notice to appear.
 - (b) The notice shall:
 - (1) Be in writing;
 - (2) State the name of the person and his address, if known;
 - (3) Set forth the nature of the offense;
 - (4) Be signed by the officer issuing the notice; and
- (5) Direct the person to appear before a court at a certain time and place.
- (c) Upon failure of the person to appear, a summons or warrant of arrest may issue.

History: En. 95-614 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The notice to appear is a courtesy to the person involved and his failure to appear will result in a summons or warrant of arrest being issued. There is no civil or criminal penalty for failure to appear.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-12.

- 95-615. Offenses committed by corporations. (a) Upon a charge filed against a corporation for the commission of an offense the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.
- (b) The summons for the appearance of a corporation may be served in the manner provided for service of summons upon a corporation in a civil action.
- (c) If, after being summoned, the corporation does not appear, a plea of not guilty shall be entered by the court having jurisdiction to try the

offense for which the summons was issued, and such court shall proceed to trial and judgment without further process.

History: En. 95-615 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-13.

Collateral References

Corporations 531 et seq. 19 C.J.S. Corporations § 1366 et seq.

- 95-616. Persons exempt from arrest. (a) Electors shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at election, and in going to and returning from the same.
- (b) Senators and representatives shall, in all cases, except felony or breach of the peace, be privileged from arrest during the sessions of the state legislature, and in going to and returning from the same.
- (c) The militia shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters and election, and in going to and returning from the same.
- (d) Judges, attorneys, clerks, sheriffs, and other court officers shall be privileged from arrest while attending court and while going to and returning from court.

History: En. 95-616 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The word "militia" as used in paragraph (c) is intended to include the state militia.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 107-7.

Cross-References

Electors, privilege from arrest, sec. 23-308.

Exemptions from arrest, privileges of militia, sec. 77-158.

Home guard, freedom from arrest, sec. 77-1213 (b).

Legislators, freedom from arrest, Mont. Const. Art. V, § 15.

Collateral References

Arrest ≈ 60. 6 C.J.S. Arrest §§ 29-31. 5 Am. Jur. 2d 781, Arrest, § 95 et seq.

95-617. Magistrate may order arrest. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

History: En. 95-617 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6005.

Collateral References

Arrest \$5.

- 95-618. Roadblocks. (a) Definition. For the purpose of this act, a "temporary roadblock" means any structure, device, or means used by the duly elected or appointed law-enforcement officers of this state, and their deputies, for the purpose of controlling all traffic through a point on the highway whereby all vehicles may be slowed or stopped.
- (b) Authority to Establish Roadblocks. The duly elected or appointed law-enforcement officers of this state, and their deputies, are hereby authorized to establish, in their respective jurisdictions, or in other jurisdictions within the state, temporary roadblocks on the highways of this state for the purpose of identifying drivers, and apprehending persons

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wanted for violation of the laws of this state, or of any other state, or of the United States, who are using the highways of this state.

- (c) Minimum Requirements. For the purpose of warning and protecting the traveling public, the minimum requirements to be met by such officers establishing temporary roadblocks, if time and circumstances allow, are:
- 1. The temporary roadblock must be established at a point on the highway clearly visible at a distance of not less than one hundred (100) yards, in either direction.
- 2. At the point of the temporary roadblock, a sign shall be placed on the center line of the highway displaying the word "stop" in letters of sufficient size and luminosity to be readable at a distance of not less than fifty (50) yards, in both directions, either in daytime or darkness.
- 3. At the same point of the temporary roadblock, at least one (1) red light, which shall be a flashing or intermittent beam of light, must be placed at the side of the roadway clearly visible to the oncoming traffic, at a distance of not less than one hundred (100) yards.
- 4. At a distance of not less than two hundred (200) yards from the point of the temporary roadblock, warning signs must be placed at the side of the highway, containing any wording of sufficient size and luminosity, to warn the oncoming traffic that a "police stop" lies ahead. A burning beam light, flare, or a lantern must be placed near such signs for the purpose of attracting the attention of approaching drivers during hours of darkness. A red flag may be used for the same purpose during daylight hours.
- (d) Existing Law Preserved. Nothing in this act shall be deemed to limit, or encroach upon the existing authority of Montana law-enforcement officers in the performance of their duties involving traffic control.
- (e) Penalty. Any person who shall proceed or travel through a roadblock without subjecting himself to the traffic control so established shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both fine and imprisonment.

History: En. 95-618 by Sec. 1, Ch. 196,

Cross-References

Source: Revised Codes of Montana 1947, section 94-6030.

Inspections of vehicles by highway patrol and highway commission, sec. 32-21-155.

- 95-619. Close pursuit—power of arrest by officers of another state.

 (a) Any peace officer of another state of the United States, who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person, as peace officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state.
- (b) Hearing as to Locality of Arrest. If an arrest is made in this state by an officer of another state in accordance with the provisions of section 95-619 (a), he shall, without unnecessary delay, take the person

arrested before a judge of a court of record who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of section 95-619 (a) and not of determining the guilt or innocence of the arrested person. If the judge determines that the arrest was in accordance with such provisions, he shall commit the person arrested to the custody of the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled. If the judge determines that the arrest was unlawful, he shall discharge the person arrested.

- (c) Construction of Act. Section 95-619 (a) shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.
- (d) "State" Defined. For the purpose of this act the word state shall include the District of Columbia.
- (e) Certification of Act. Upon the passage and approval by the governor of this act, it shall be the duty of the secretary of the state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.
- (f) Act, How Cited. This act may be cited as the Uniform Act on Close Pursuit.

History: En. 95-619 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-6023 through 94-6028.

Collateral References

Arrest € 63 (3).

6 C.J.S. Arrest § 6. 5 Am. Jur. 2d 743, Arrest, § 51.

CHAPTER 7

SEARCH AND SEIZURE

Section 95-701. Searches and seizures—when authorized. 95-702. Scope of search without warrant.

95-703. Search warrant defined.

95-704. Grounds for search warrant.

95-705. Scope of search with warrant. 95-706. Filing of application. 95-707. By whom served.

95-708. Service and execution of search warrants.

95-709. Use of force in execution of search warrant. 95-710. Detention and search of persons on premises.

95-711. When warrant may be executed. 95-712. Return to court of things seized under search warrant.

95-713. Custody and disposition of things seized under search warrant. 95-714. Custody and disposition of things seized without search warrant.

95-715. Return of property seized.

Disposition of unclaimed property. When search and seizure not illegal. 95-716.

95-717.

95-718. Admissibility in other proceedings.

- 95-701. Searches and seizures—when authorized. A search of a person, object or place may be made and instruments, articles or things may be seized in accordance with the provisions of this chapter when the search is made:
 - As an incident to a lawful arrest.

- (b) With the consent of the accused or of any other person who is lawfully in possession of the object or place to be searched, or who is believed upon reasonable cause to be in such lawful possession by the person making the search.
 - (c) By the authority of a valid search warrant.
- (d) Under the authority and within the scope of a right of lawful inspection granted by law.

History: En. 95-701 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This is new and has no counterpart in the codes of other states. It is intended to state the law as to when searches and seizures are authorized and codifies the present law as laid down by state and federal decisions. It is the law in Montana and under the federal decisions that a search and seizure may be made without a warrant as an incident to a lawful arrest or where the individual freely and intelligently gives his unequivocal and specific consent to search, uncontaminated by any express or implied duress.

by any express or implied duress.

Subsection (d) does not broaden any right to inspection, but provides that a search and seizure may be made under constitutionally authorized inspections.

Cross-References

Unreasonable searches and seizures prohibited, Mont. Const. Art. III, § 7.

Consent

Any right which defendant may have had to complain of seizure of jacket he was wearing at time of arrest was waived where he voluntarily surrendered it to police officers upon request. State v. Nelson, 130 M 466, 304 P 2d 1110.

A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, express or implied; state has burden of proving that such consent was given; where arrest of defendant for having no driver's license was a cover-up to enable officers to search defendant's car, the search was not incident to a lawful arrest. State v. Tomich, 332 F 2d 987.

Consent

One consenting to search of his premises without warrant cannot complain that it was illegal. State ex rel. Muzzy v. Uotila, 71 M 351, 229 P 724.

After officers stated they desired to look over defendant's place, defendant's statement, "All right; go ahead" held to warrant conclusion that search was with defendant's permission. State ex rel. Muzzy v. Uotila, 71 M 351, 229 P 724.

Incident to a Lawful Arrest

When an arrest is lawfully made, the person arresting may take from the possession of the arrestee articles of property which reasonably would be of use on the trial. State ex rel. Wong You v. District Court, 106 M 347, 351, 78 P 2d 353.

Marijuana seized under the authority of a void search warrant could not have been seized as an incident of a lawful arrest since the marijuana which served as the ground for arrest was discovered by means of a void process and illegal entry; thus the marijuana was secured as a result of an illegal search and seizure and was accordingly inadmissible in evidence. State v. Langan, 151 M 558, 445 P 2d 565.

Search Warrants for Narcotics

Provisions governing issuance of search warrants for narcotic drugs set forth in the formerly applicable Uniform Drug Act were the sole and exclusive provisions governing issuance of search warrants authorizing a lawful search and seizure of narcotic drugs as defined in the act, so that marijuana seized in private residence on authority of search warrant issued by a justice of the peace was unlawfully seized and the search warrant was void because in violation of the Uniform Drug Act (since repealed). State v. Langan, 151 M 558, 445 P 2d 565.

Collateral References

Warrant to search as necessary to justify search and seizure incident to lawful arrest. 32 ALR 680; 51 ALR 424; 74 ALR 1387 and 82 ALR 782.

Automobile, search of, without warrant by officers relying on description of person suspected of crime. 60 ALR 299.

Authority to consent for another to search or seizure. 31 ALR 2d 1078.

Apartment or room to be searched in multiple-occupancy structure, search warrant: sufficiency of description of. 11 ALR 3d 1330.

Law Review

Search and Seizure: Seizure of Purely Evidentiary Items Held Constitutional (Warden, Maryland Penitentiary v. Hayden, 387 U S 294, 18 L Ed 2d 782, 87 S Ct 1642) 29 Mont. L. Rev. 101 (1967).

- 95-702. Scope of search without warrant. When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:
 - Protecting the officer from attack, or
 - (b) Preventing the person from escaping, or
 - Discovering and seizing the fruits of the crime, or
- Discovering and seizing any persons, instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

History: En. 95-702 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-1.

Incident to a Lawful Arrest

Officer lawfully making an arrest may not only search his prisoner and preserve for use on trial articles found on his person or in his immediate possession but may also, as an incident to the arrest, seize instrumentalities through which the crime was committed and other articles which will aid in proving prisoner committed the crime, particularly if such articles are in plain view and no search is required to uncover them; in prosecution for attempting to main livestock with a shotgun, shoes, shotgun and shells found near where accused was arrested in bed were admissible. State v. Benson, 91 M 21, 5 P 2d 223.

Where defendant was arrested in bed for attempt to maim livestock, his shoes, gun, and shells, being in plain sight, were properly seized by officer as incident to arrest (const. art. III, sec. 7). State v. Benson, 91 M 21, 5 P 2d 223.

When an arrest is lawfully made, the

arresting officer may take from the ar-

restee articles which reasonably would be of use at trial; lottery tickets and para-phernalia found by arresting officer in basement in which accused said lottery was being conducted were admissible. State ex rel. Wong You v. District Court, 106 M 347, 78 P 2d 353.

Probable Cause

Held, under former statute, that an officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed. State ex rel. Wong You v. District Court, 106 M 347, 352, 78 P 2d 353.

Collateral References

Arrest@71, 71.1. 6 C.J.S. Arrest § 18. 5 Am. Jur. 2d 759, Arrest, § 73.

Intoxicating liquors, necessity of warrant for search for or seizure of. 3 $\rm ALR$ 1516; 13 ALR 1316; 27 ALR 711; 39 ALR 814 and 74 ALR 1420.

Weapons, search and seizure without warrant on suspicion or information as to unlawful possession of. 92 ALR 490.

95-703. Search warrant defined. A search warrant is an order in writing, in the name of the state, signed by a judge, particularly describing the thing or place to be searched and the instruments, articles or things to be seized, directed to a peace officer, commanding him to search for personal property and bring it before the judge.

History: En. 95-703 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-301-1.

Actions Which Do Not Lie against Officer

Where a sheriff seized oil well piping under a search warrant and subsequently released it by order of the same justice of the peace to the custody from which he seized it, incidentally enabling the person who procured the warrant to take it, under claim of ownership, claim and delivery does not lie against sheriff on theory of wrongful and negligent loss of possession; conversion does not lie where no facts are alleged that he instigated or assisted in the alleged wrongful taking; trespass and trespass on the case do not lie unless the injury is "proximate result" of sheriff's wrongful or negligent acts or defaults. Harri v. Isaac, 111 M 152, 156, 107 P 2d 137.

Nature and Necessity

The issuance of a search warrant by the district court is a judicial proceeding. State v. Tesla, 69 M 503, 223 P 107.

The process of search and seizure may be invoked only in furtherance of public prosecution. State ex rel. King v. District Court, 70 M 191, 224 P 862.

Unreasonable Searches and Seizures

In the prosecution for murder, the admission of evidence that shoes taken from defendant without his consent corresponded with tracks found near the scene of the killing, did not deprive defendant of the rights guaranteed to him by section 7, article III of the constitution, prohibiting unreasonable searches and seizures. State v. Fuller, 34 M 12, 85 P 369.

Searches and seizures which are not lawful and which are not conducted as the law prescribes are unreasonable within section 7, article III of the constitution. State ex rel. King v. District Court, 70 M 191, 224 P 862. (See also State ex rel. Sadler v. District Court, 70 M 378, 225 P 1000.) State v. Mullaney, 92 M 553, 16 P 2d 407.

The protection granted by section 7, article III of the constitution, from unreasonable searches and seizures reaches all alike, whether accused of crime or not, and the duty of enforcing it is obligatory upon all entrusted wth the enforcement of the law. State ex rel. King v. District Court, 70 M 191, 224 P 862.

Search, unlawful at inception, does not become lawful by what is found. State ex rel. King v. District Court, 70 M 191, 224

Constitutional provision against unreasonable search and seizure applies to per-

son and baggage and personal belongings, and in search of person unlawfully arrested and seizure of his personal belongings. State v. Mullaney, 92 M 553, 16 P 2d 407.

An arrest, or search and seizure, made without a warrant is illegal and, therefore, unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances or credible information cal-culated to produce such belief. State ex rel. Wong You v. District Court, 106 M 347, 354, 78 P 2d 353.

Search made upon consent of owner, freely given on officers' request is not an "unreasonable search." United States v.

Williams, 295 F 219.

Peace officers should be encouraged, but evidence of crime must be lawfully obtained (const. amend. 4). United States v. Clark, 18 F 2d 442.

Collateral References

Searches and Seizures 3.1.

79 C.J.S. Searches and Seizures § 3.

47 Am. Jur., Searches and Seizures, p. 511 et seq., § 14 et seq.; p. 520 et seq., § 31 et seq.

Propriety and legality of issuing only one search warrant to search more than one place or premises occupied by same person. 31 ALR 2d 864.

DECISIONS UNDER FORMER LAW

Prohibition Enforcement Act

The general provisions of former sections relating to the issuance of search warrants, were not amended or modified by the provisions of the Prohibition Enforcement Act. State v. Tesla, 69 M 503, 509, 223 P 107.

- 95-704. Grounds for search warrant. Any judge may issue a search warrant upon the written application of any person that an offense has been committed, made under oath or affirmation before him which:
- States facts sufficient to show probable cause for issuance of the warrant,
 - Particularly describes the place or things to be searched, and
 - Particularly describes the things to be seized.

History: En. 95-704 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section is designed to set forth the requirements essential to obtain a search warrant and contemplates the actual presence, before the magistrate, of the individual making the application.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-3.

Cross-References

Complaint against pawnbrokers or junk

dealers, issuance and service of search

warrant, secs. 66-1602, 66-1603.
Liquor Control Act, issuance of search warrant, sec. 4-208.

Maliciously procuring search warrant, penalty, sec. 94-35-122.

Narcotic drugs, issuance for, secs. 54-112, 54-113.

Description of Place and Property

Where probable cause for issuance of search warrant was shown by deposition of complainant, disclosing time, place and manner of an alleged violation of the liquor law, warrant could validly issue, notwithstanding that complaint for warrant did not set forth the time of commission of offense. State v. Tesla, 69 M 503, 509, 223 P 107.

A search warrant as to the description of the premises to be searched must be complete in itself. State ex rel. King v. District Court, 70 M 191, 224 P 862.

A warrant must designate the premises

A warrant must designate the premises to be searched and contain a description so specific as to avoid any unauthorized invasion of the right of privacy, and must identify the property in such manner as to leave to the officer no discretion as to the premises to be searched. There must be no obscurity nor uncertainty. State ex rel. King v. District Court, 70 M 191, 224 P 862.

Description of place to be searched as ranch with small buildings, located about five miles in westerly direction from town named, held insufficient. Fall v. United States, 33 F 2d 71.

Judicial Examination

Where a deputy county attorney had presented a verified complaint for a search warrant based upon the affidavit of another, and the district judge examined the latter under oath, the fact that he did not also examine the complainant himself, as formerly required by statute, did not render the warrant illegal, since the only information the complainant had was that obtained from the affiant and an examination of the former would have been useless. State v. English, 71 M 343, 345, 346, 229 P 727.

Limited by Statute

The use of search warrants is not to be extended by construction to any case not clearly covered by statute. State ex rel. Streit v. Justice Court, 45 M 375, 382, 123 P 405.

"Probable Cause"

A search warrant issued on a conclusion of the applicant, without any facts stated in the application on which the judicial officer to whom it is addressed may form his own conclusion, is not a showing of "probable cause supported by oath or affirmation," within the meaning of section 7, article III of the constitution. State ex

rel. Samlin v. District Court, 59 M 600, 198 P 362.

An application for a search warrant must set forth sufficient facts to enable a judicial officer to see that probable cause for its issuance exists. State ex rel. Thibodeau v. District Court, 70 M 202, 224 P 866; State ex rel. Baracker v. District Court, 75 M 476, 244 P 280.

To obtain a search warrant under the liquor laws, the facts upon which its issuance is sought must be stated under oath and be sufficient to enable the magistrate to whom application is made to determine the existence of probable cause without reference to the opinion of the applicant. State ex rel. Stange v. District Court, 71 M 125, 219, 227 P 576.

The circumstances justifying issuance of a search warrant must create a reasonable belief that probable cause exists, and must be as strong as those which would warrant the institution of a criminal charge for an arrest on such charge without warrant. State ex rel. Stange v. District Court, 71 M 125, 227 P 576.

Evidence held to establish probable cause for search and seizure. In re Herter, 30 F 2d 968, modified in 33 F 2d 400.

Collateral References

Searches and Seizures \$3.6, 3.7.
79 C.J.S. Searches and Seizures \$73

et seq. 47 Am. Jur. 516 et seq., Searches and Seizures, § 21 et seq.

Disputing matter stated in supporting affidavit. 5 ALR 2d 394.

Sufficiency of affidavit for search warrant based on affiant's belief, based in turn on information, investigation, etc., by one whose name is not disclosed. 14 ALR 2d 605.

Sufficiency of description in search warrant of automobile or other conveyance to be searched. 47 ALR 2d 1444.

Sufficiency of description in warrant of person to be searched. 49 ALR 2d 1209. Search warrant, sufficiency of showing

as to time of occurrence of facts relied on. 100 ALR 2d 525.

Probable cause for issuance of search warrant, propriety of considering hearsay or other incompetent evidence in establishing. 10 ALR 3d 359.

DECISIONS UNDER FORMER LAW

Deposition and Affidavit

Former section declared that a magistrate before issuing a search warrant must take the deposition of any witness in writing. Issuance of warrant upon an affidavit did not render the warrant illegal, the words "deposition" and "affidavit" having been used interchangeably in the chapter

relating to search warrants. State v. English, 71 M 343, 345, 346, 229 P 727.

Public Offense

Under former section authorizing issuance of search warrant when property was in possession of any person with intent to use as means of committing a

public offense, the alleged threatened violation of a town ordinance, by conducting a saloon without first obtaining a license, did not justify issuance warrant commanding that a designated building be searched for intoxicating liquors. State ex rel. Streit v. Justice Court, 45 M 375, 382, 123 P 405.

Violations of city ordinance were not included within meaning of "public offense," as those words were employed in former section, authorizing issuance of search warrant when property was in possession of any person with intent to use as means

of committing a public offense. State ex rel Streit v. Justice Court, 45 M 375, 381, 123 P 405.

Test for Sufficiency of Affidavit

Test to determine whether affidavit for search warrant stated facts sufficient to justify its issuance was whether affiant could be prosecuted for perjury if the statement is false; affidavit stating only conclusions was insufficient. State ex rel. Baracker v. District Court, 75 M 476, 244 P 280.

95-705. Scope of search with warrant. A search warrant may authorize the seizure of the following:

- (a) Contraband.
- (b) Any instruments, articles or things which are the fruits of, have been used in the commission of, or which may constitute evidence of, any offense.
- (c) Any person who has been kidnaped in violation of the laws of this state, or who has been kidnaped in another jurisdiction and is now concealed within this state.

History: En. 95-705 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision sets out as expansively as possible the items which may be seized under a search warrant.

It does not eliminate the necessity of "particularly describing" the place to be searched or the things to be seized.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-3 (a) and (b).

Collateral References

Stationary vehicle, right to search or seize vehicle containing contraband as affected by the fact that it was stationary at the time. 61 ALR 1002.

Automobile as a container or paraphernalia within statute as to forfeiture of articles used in connection with illegal sale of liquor. 129 ALR 394.

Seizure of instruments of or articles connected with another crime in making search incidental to arrest. 169 ALR 1420.

95-706. Filing of application. The application on which the warrant is issued shall be retained by the judge but need not be filed with the clerk of the court nor with the court if there is no clerk, until the warrant has been executed or has been returned "not executed."

History: En. 95-706 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-4.

95-707. By whom served. A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer on his requiring it, he being present and acting in its execution.

History: En. 95-707 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-301-8.

Collateral References

Searches and Seizures 3 (9).
79 C.J.S. Searches and Seizures \$70
et seq.
47 Am. Jur. 525 et seq., Searches and

47 Am. Jur. 525 et seq., Searches and Seizures, § 39 et seq.

95-708. Service and execution of search warrants. Service of a search warrant is made by exhibiting the original warrant at the place to be

searched. If the warrant is executed, a duplicate copy, and a receipt for all articles taken shall be left with any person from whom any instruments, articles or things are seized, or, if no person is available, the copy and receipt shall be left at the place from which the instruments, articles or things were seized. Failure to give or leave such a receipt shall not render the evidence inadmissible in a trial.

History: En. 95-708 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-6; and Revised Codes of Montana 1947, section 94-301-13.

95-709. Use of force in execution of search warrant. All necessary and reasonable force may be used to execute a search warrant or to effect an entry into any building or property or part thereof to execute a search warrant.

History: En. 95-709 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Source: Illinois Code of Criminal Pro- § 41. cedure, Chapter 38, section 108-8; and

cedure, Chapter 38, section 108-8; and Revised Codes of Montana 1947, sections 94-301-9 and 94-301-10.

47 Am. Jur. 526, Searches and Seizures, § 41.

- 95-710. Detention and search of persons on premises. In the execution of the warrant the person executing the same may reasonably detain and search any person in the place at the time:
 - (a) To protect himself from attack, or
- (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

History: En. 95-710 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The word "reasonably" applies to both time and manner.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-9.

95-711. When warrant may be executed. The warrant may be executed at any time of any day or night. The warrant shall be executed within ten (10) days from the time of issuance. Any warrant not executed within such time shall be void and shall be returned to the court or the judge issuing the same as "not executed."

History: En. 95-711 by Sec. 1, Ch. 196, L. 1967.

Collateral References

47 Am. Jur. 526, Searches and Seizures, § 40.

Source: Illinois Code of Criminal Procedure, Chapter 38, sections 108-6 and 108-13; and Revised Codes of Montana 1947, sections 94-101-11 and 94-101-12.

95-712. Return to court of things seized under search warrant. The return of the warrant and all instruments, articles and things seized shall be made promptly before the judge who issued the warrant, or if he is absent or unavailable, before the nearest available judge and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The judge shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

History: En. 95-712 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section not only requires a return to the magistrate issuing the warrant, if available, but in addition provides for a copy of the inventory to be given to the deprived possessor of the goods to ensure an adequate record of what was taken for the protection of both parties. Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-10; and Revised Codes of Montana 1947, sections 94-301-16 and 94-301-17.

Collateral References

Searches and Seizures©3 (9). 79 C.J.S. Searches and Seizures § 78

et seq. 47 Am. Jur. 527, Searches and Seizures,

95-713. Custody and disposition of things seized under search warrant. The judge before whom the instruments, articles or things are returned shall enter an order providing for their custody or appropriate disposition pending further proceedings.

§§ 43, 44.

History: En. 95-713 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The words "appropriate disposition" give the court leeway in disposing in an appropriate manner of such items as perishables or cattle when there is a falling market.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-11.

Collateral References

Searches and Seizures 5.

79 C.J.S. Searches and Seizures § 114. 47 Am. Jur. 529, Searches and Seizures, §§ 48, 49.

95-714. Custody and disposition of things seized without search warrant. Any peace officer seizing any instruments, articles or things must give a receipt to the person from whose possession they are taken, but failure to give such a receipt shall not render the evidence seized inadmissible upon a trial.

If an arrest has been made all instruments, articles or things seized on a search without warrant shall be delivered to the judge before whom the person arrested is taken, and thereafter handled and disposed of in accordance with sections 95-712, 95-713 and 95-715. If the person arrested is released without a charge being preferred against him, all instruments, articles or things seized from him, other than contraband, shall be returned to him upon release.

If no arrest has been made such instruments, articles or things may be retained in the custody of the officer making the seizure for a time sufficient for investigation of the supposed crime, after which they must be delivered to the proper judge for disposition in accordance with sections 95-712, 95-713 and 95-715, or returned to the person from whom they were taken.

History: En. 95-714 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section conforms the procedure for handling things seized on a search incident to arrest to that prescribed for things seized on a warrant search. Any "taking" by a police officer amounts to a seizing.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-2.

Collateral References

Criminal Law 1221.

24B C.J.S. Criminal Law §§ 2004, 2006.

Intoxicating liquors, necessity of warrant for search for or seizure of. 3 ALR 1516; 13 ALR 1316; 27 ALR 711; 39 ALR 814 and 74 ALR 1420.

Searches and seizures by health officers without warrant. 13 ALR 2d 969.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place. 19 ALR 2d 1228.

- 95-715. Return of property seized. Any person claiming the right to possession of property seized as evidence may apply to the judge to whom it has been delivered for its return. The judge shall give such notice as he deems adequate to the county attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the judge's satisfaction, he shall order the property, other than contraband, returned if:
- (a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence, or
 - (b) All proceedings in which it might be required have been completed.

History: En. 95-715 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Searches and Seizures \$91.
47 Am. Jur. 529 et seq., Searches and Seizures, §48 et seq.

95-716. Disposition of unclaimed property. If property seized as evidence is not claimed within six (6) months of completion of the case for which it was seized, and if, after proper inquiry, the judge cannot ascertain or locate any person entitled to its possession, he must order the property to be sold by the sheriff. The proceeds from such sale, after deduction of the costs of storage and preservation of the property, must be paid into the county treasury.

History: En. 95-716 by Sec. 1, Ch. 196, L. 1967.

- 95-717. When search and seizure not illegal. No search and seizure, whether with or without warrant, shall be held to be illegal as to a defendant if:
- (a) The defendant has disclaimed any right to, or interest in the place or object searched or the instruments, articles or things seized, or
- (b) No right of the defendant has been infringed by the search and seizure, or
- (c) Any irregularities in the proceedings do not affect the substantial rights of the accused.

History: En. 95-717 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 108-14.

Disclaimer

Suppression of evidence found in car in

which defendant was riding at time of arrest was not error where the vehicle belonged to defendant's companion and defendant disclaimed any ownership or right to possession of it or any of the property taken from it. State v. Nelson, 130 M 466, 304 P 2d 1110.

95-718. Admissibility in other proceedings. Instruments, articles or things lawfully seized are admissible as evidence upon any prosecution or proceeding whether or not the prosecution or proceeding is for the offense in connection with which the search was originally made.

History: En. 95-718 by Sec. 1, Ch. 196, L. 1967.

CHAPTER 8

THE OFFICE OF THE CORONER

Section 95-801. The office of the coroner.
95-802. Coroner to have autopsy—when.
95-803. Coroner to hold inquest—when.
95-804. Jurors to be sworn.
95-805. Witnesses to be subpoenaed.
95-806. Witness compelled to attend.
95-807. Verdict of jury in writing, what to contain.
95-808. Testimony in writing and where filed.
95-809. Inquest shall be public.
95-810. Property found on body—to whom delivered.
95-811. Must keep register.
95-812. Jurisdiction of coroner.
95-813. Liability of a mortuary or physician.
95-814. The coroner shall have needed assistance.

95-801. The office of the coroner. When a coroner is informed that a death or stillbirth was caused by other than natural causes or that a death or stillbirth has occurred under circumstances such as to afford a reasonable ground to suspect that the death is the result of criminal conduct, or when no physician or surgeon, licensed in the state of Montana, will sign a death certificate, the coroner shall make an investigation thereof. It shall be the duty of every person acquiring knowledge of such a death to report the same forthwith to the coroner of the county in which death apparently occurred. In cases where criminal conduct is suspected, the coroner shall notify one or more law enforcement agencies having jurisdiction. The law enforcement agencies so notified shall have the responsibility to investigate the case.

History: En. 95-801 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The provision shifts the emphasis from a formal inquest to a regular investigation by law enforcement agencies.

Source: Revised Codes of Montana 1947, section 94-201-1.

Cross-References

County coroner, Title 16, ch. 34.

Collateral References

Coroners 1, 8. 18 C.J.S. Coroners § 24.

95-802. Coroner to have autopsy—when. If in the opinion of the coroner an autopsy is advisable, he shall order one and shall retain a physician or pathologist to perform it. A full record of the facts found shall be made on a form provided by the Montana state board of health in duplicate, the coroner retaining one copy and delivering the other to the county attorney. The right to conduct an autopsy shall include the right to retain such specimens as the physician or pathologist performing the autopsy deems necessary. Performance of autopsies is within the discretion of the coroner except that the county attorney or attorney general may require one. In ordering an autopsy the coroner shall order the body to be exhumed if it has been interred.

History: En. 95-802 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section, in conjunction with section 95-801, gives the coroner wide discretion to perform or provide for autopsies

to be performed. It specifically authorizes autopsies without the holding of inquests. Records and reports of autopsies made under this act shall be received as evidence in any court or other proceeding, except that statements by conclusions on extraneous matters are not admissible.

The person preparing a report hereunder to be given in evidence may be subpoenaed as a witness in any civil or criminal case by any party. Copies of the report, when duly attested by the coroner, shall be received in any proceeding as the original and are part of the public record.

95-803. Coroner to hold inquest—when. An inquest is a formal inquiry into the causes of and circumstances surrounding the death of any person. The coroner shall hold an inquest only if requested to do so by the county attorney of the county in which death occurred or by the county attorney of the county in which the acts or events causing death occurred. The coroner shall conduct the inquest with the aid and assistance of the county attorney. For holding such inquest, the coroner must summon a jury of not more than nine (9) persons, qualified by law to serve as jurors. Such inquest is to be held in accordance with sections 95-804 through 95-809 of this chapter.

History: En. 95-803 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The purpose of this provision is to eliminate the coroner's inquest except when the county attorney requests one to be held. The county attorney should request inquests to be held when he believes them necessary in:

(a) All violent deaths, whether apparently homicidal, suicidal, or accidental.

- (b) Deaths not caused by readily recognizable disease, disability or infirmity, where there is a reasonable possibility of criminal action.
- (c) Deaths under suspicious circumstances.
- (d) Deaths from causes which might constitute a threat to public health.
- (e) Deaths of inmates of public institutions not hospitalized therein for disease.
- (f) Deaths from occupational disease or hazards.

The preliminary determination of whether a crime has been committed is primarily a police function. It is generally recognized that a coroner seldom has the training to investigate properly and that in most instances an inquisition is a clumsy means of investigation.

Cross-Reference

Inquest at coal mines, sec. 50-524.

Coroner Juror Serving as Trial Juror

Where the voir dire examination of a trial juror in a murder case failed to reveal the fact that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty

of both to advise the trial court at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. State v. Allison, 116 M 352, 364, 153 P 2d 141.

Introduction of Testimony at Trial

Where one charged with homicide, without knowledge of his constitutional rights against self-incrimination, section 18 article III of the constitution, and without being informed of his right to counsel, that he could refuse to testify, and that his statements might thereafter be used against him, was required to answer questions at the inquest put to him by the county attorney under the belief that he had to obey his orders, and the state at the trial in its case in chief introduced his entire testimony so given, the admission thereof was in violation of defendant's constitutional rights, necessitating reversal of the judgment of conviction. State v. Allison, 116 M 352, 355, 153 P 2d 141.

Nature of Proceeding

Defendant's admission at coroner's inquest that he drove at unlawful speed held admissible, as admission against interest, as part of plaintiff's case in chief. Marinkovich v. Tierney, 93 M 72, 17 P 2d 93.

In holding an inquest the coroner acts judicially, and although an inquest is essentially a criminal proceeding, it is not a trial involving the merits of a prosecution but rather a preliminary investigation only. State v. Allison, 116 M 352, 355, 153 P 2d 141.

Collateral References

Coroners©=10. 18 C.J.S. Coroners § 14. 18 Am. Jur. 2d 520 et seq., Coroners or Medical Examiners, § 7 et seq.

When holding of inquest or autopsy justified, 48 ALR 1209.

95-804. Jurors to be sworn. When six (6) or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence offered to them, or arising from the inspection of the body.

History: En. 95-804 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-201-2.

Collateral References

Coroners \$12.

18 C.J.S. Coroners \$17.

18 Am. Jur. 2d 525, 529, Coroners or Medical Examiners, §\$12, 15.

95-805. Witnesses to be subpoenaed. A coroner may issue subpoenas for witnesses, returnable forthwith; or at such time and place as he may appoint, which may be served by any competent person. He must summon and examine as witnesses every person who, in his opinion, or that of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death.

History: En. 95-805 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-201-3.

Collateral References

Coroners 20.
18 C.J.S. Coroners § 20.
18 Am. Jur. 2d 524, Coroners or Medical Examiners, § 11.

95-806. Witness compelled to attend. A witness served with a subpoena may be compelled to attend and testify, or be punished as upon a subpoena issued by a justice of the peace.

History: En. 95-806 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-201-4.

Collateral References

Coroners ≈ 13. 18 C.J.S. Coroners § 20. 18 Am. Jur. 2d 530, Coroners or Medical Examiners, § 16.

95-807. Verdict of jury in writing, what to contain. After inspecting the body and hearing the testimony, the jury must render its verdict which shall be by majority vote, and certify the same in writing, signed by them and setting forth who the deceased person is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another by criminal means, who committed the act.

History: En. 95-807 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-201-5.

Collateral References

Coroners 18.
18 C.J.S. Coroners § 22.
18 Am. Jur. 2d 529, Coroners or Medical Examiners, § 15.

95-808. Testimony in writing and where filed. The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the clerk of the district court of the county.

The coroner must order the inquest proceedings recorded and transcribed by a qualified stenographer and such recording and transcribing expenses shall be paid by the county upon claims duly rendered and certified to by the coroner in the same manner as other claims against the county are paid.

History: En. 95-808 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-201-6.

Collateral References
Coroners 17.
18 C.J.S. Coroners § 23.

DECISIONS UNDER FORMER LAW

Denial of Bill of Particulars

Where inquest had been held a year prior to prosecution for manslaughter for killing of pedestrian by reckless driving, court could presume that coroner had complied with law as to transcript of testi-

mony available for defendant's inspection for desired information, held, denial of defendant's motion for bill of particulars not abuse of court's discretion. State v. Robinson, 109 M 322, 327, 96 P 265.

95-809. Inquest shall be public. If an inquest is held the proceedings shall be public.

History: En. 95-809 by Sec. 1, Ch. 196, L. 1967.

95-810. Property found on body—to whom delivered. Any property found with or upon the person of the deceased which is not needed as evidence shall be turned over by the county coroner to the public administrator, to be held until disposed of according to law. Any property needed as evidence shall be turned over to the appropriate investigative authority.

History: En. 95-810 by Sec. 1, Ch. 196, Source: New. See Revised Codes of L. 1967.

95-811. Must keep register. The county coroner shall keep an official register, in which he must enter the date of holding all inquests, the cause and circumstances of death, if known, and the name of the deceased, when known, and when not, such description of the deceased as may be sufficient for identification.

History: En. 95-811 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 16-3407.

95-812. Jurisdiction of coroner. When death occurs as a direct result of acts or events which occurred in another county, the coroner of either county shall have jurisdiction. If a conflict of jurisdiction should arise, or should said coroners fail to act, the coroner of the county where the death occurred shall have the primary jurisdiction.

History: En. 95-812 by Sec. 1, Ch. 196, L. 1967.

95-813. Liability of a mortuary or physician. No person or firm owning a mortuary or any person employed in such a mortuary shall be liable for the acts of the coroner performed in the removal of any body to a mortuary or during the course of an autopsy on such body. No criminal or civil action shall arise against a licensed physician for performing an autopsy authorized by this act.

History: En. 95-813 by Sec. 1, Ch. 196, L. 1967.

95-814. The coroner shall have needed assistance. The county commissioners are authorized to provide and pay for such laboratory facilities, and other technical and clerical assistance as may be required by the county coroner. The coroner, with the approval of the county commissioners, may appoint one or more deputy coroners.

History: En. 95-814 by Sec. 1, Ch. 196, L. 1967.

CHAPTER 9

INITIAL APPEARANCE OF ARRESTED PERSON

Section 95-901. Duty of person who has made an arrest. 95-902. Duty of the court.

- 95-901. Duty of person who has made an arrest. (a) Any person making an arrest under a warrant shall take the arrested person without unnecessary delay before the judge issuing the warrant, or if he is absent or unable to act, before the nearest or most accessible judge of the same county. If an arrest is made in a county other than the one in which the warrant was issued the arrested person shall be taken without unnecessary delay before the nearest and most accessible judge in the county where the arrest was made.
- (b) Any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest or most accessible judge in the same county and a complaint, stating the charges against the arrested person, shall be filed forthwith.

History: En. 95-901 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision includes the requirement of an appearance before a magistrate without unnecessary delay after arrest in cases of arrest with a warrant.

It allows a first appearance in the county where the arrest is made rather than forcing the arrested person to be removed to another county for the purpose of stating the charge and setting bail.

Availability of Magistrate

In an action for false imprisonment brought by the plaintiff against a sheriff and surety on his official bond based on unnecessary delay in taking plaintiff before a magistrate, it was necessary for the plaintiff to prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P 2d 1026.

Damages for False Imprisonment

In an action against a sheriff and the surety on his official bond for false imprisonment after arrest without a warrant,

based on officer's failure to take plaintiff before a committing magistrate or judicial officer, involving also transportation by federal postal inspectors to neighboring county and interpretation of section 591 of Title 18 U. S. C., held, that evidence sufficient to show prima facie case of such imprisonment, but remanded for new trial unless plaintiff consents to reduction of damages. Cline v. Tait, 116 M 571, 574, 155 P 2d 752.

Purpose

The purpose of former statute requiring one arrested without warrant to be taken before magistrate without unnecessary delay was to ensure that the person arrested was advised of the charge made against him in order to enable him to prepare a defense, and to protect him from being held incommunicado for protracted periods of time. State v. Nelson, 139 M 180, 362 P 2d 224, 229.

Unlawful Detention

Defendant convicted of the crime of uttering and delivering a fictitious check was not entitled to a reversal of his conviction because he was detained for a period of 21 days without being taken before a magistrate where there was no confession and the detention did not prejudice him in presenting his defense on the merits at the trial. State v. Johnston, 140 M 111, 367 P 2d 891, 892.

What Does Not Constitute Unnecessary Delay

In an action against a sheriff and the surety on his official bond for false imprisonment because of failure to take the arrested person before a magistrate, held, that in the state of the record, the jury could not properly conclude that a delay to nine o'clock in the morning was unreasonable under section 25-306, fixing the hours for certain justices of the peace. Cline v. Tait, 113 M 475, 484, 129 P 2d 89.

Defendant's confession was not rendered inadmissible by reason of delay in taking him before a magistrate where he was requested at 8:55 p. m., Friday, November 7, 1958, to come voluntarily to jail for questioning; shortly after questioning by sheriff at about 10:00 p. m. he made an oral statement and at 11:50 p. m. wrote and signed a confession; he was booked at 12:07 a. m., Saturday, November 8; at 10:40 a. m. on Saturday a statement was taken from defendant in the county attorney's office in the presence of the sheriff and deputy county attorney; and at 11:45 a. m., Saturday, November 8, defendant was brought before the magistrate in the courthouse. State v. Nelson, 139 M 180, 362 P 2d 224, 229, 230.

Collateral References

Arrest \$\infty 70; Criminal Law \$\infty 222, 229. 6 C.J.S. Arrest \ 17. 5 Am. Jur. 2d 762, Arrest, \ 76, 77.

95-902. Duty of the court. The judge shall inform the defendant:

- (a) Of the charge against him;
- (b) Of his right to counsel;
- (c) Of his right to have counsel assigned by a court of record, in accordance with the provisions of section 95-1001;
- (d) That he is not required to make a statement and that any statement made by him may be offered in evidence at his trial;
- (e) Admit the defendant to bail in accordance with the provisions of this code.

After the initial appearance a justice of the peace court shall, within a reasonable time, hold a preliminary examination unless the defendant waives a preliminary examination or the district court has granted leave to file an information or an indictment has been returned, or the case is triable in justice court.

History: En. 95-902 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Failure to follow the above provision would not vitiate a conviction or suffice as grounds for a motion to dismiss. In so far as substantive rights are not injured by an unlawful detention and there is no prejudice, there should be no dismissal or reversal although there might be a suit for false arrest or unlawful detention. It is less likely that a defend-

ant's constitutional rights will be abridged if the above procedure is rigorously followed. If the defendant is informed of his constitutional rights as early as possible the entire subsequent procedure is apt to be looked upon with more favor by a reviewing court.

Collateral References

Criminal Law ← 231, 232. 22 C.J.S. Criminal Law § 339 (3). 21 Am. Jur. 2d 334 et seq., Criminal Law, § 309 et seq.

CHAPTER 10

RIGHT TO COUNSEL

Section 95-1001. Right to counsel. 95-1002. Waiver of counsel.

95-1003. Duration of appointment. 95-1004. Appointment after trial.

95-1005. Remuneration of appointed counsel.

95-1006. Public defender's office.

95-1001. Right to counsel. Every defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel. The defendant, if charged with a felony, must be advised that counsel will be furnished at state expense if he is unable to employ counsel. If the offense charged is a felony and if the defendant desires counsel and is unable to employ counsel a court of record must assign counsel to defend him. If the offense charged is a misdemeanor and if the defendant desires counsel and is unable to employ counsel a court of record, in the interest of justice, may assign counsel to defend him.

History: En. 95-1001 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides for the right to counsel by requiring that the defendant, when brought before a court of record, be informed of his right to counsel and asked if he desires counsel. If he is indigent and charged with a felony he must be advised that counsel will be provided at state expense.

The court must determine whether the defendant is indigent, i.e., unable to employ counsel, and therefore entitled to assigned counsel. In making this determination the court may wish to consider such factors as income, property owned, savings, investments, pensions, unemployment compensation, social security, resources of spouse, parents, or relatives, and the number and age of dependents. The defendant's ability to post bail may be another consideration.

The question of appointed counsel for a misdemeanor is left to the judge's discretion.

Cross-References

Rights of defendant in a criminal action, sec. 94-4806.

Right to counsel, Mont. Const. Art. III, § 16.

Appointment of Counsel

On his arraignment defendant informed the court that he did not wish to employ counsel, and was admitted to bail, furnishing a \$10,000 cash bail bond. On the day of trial, four months thereafter, he stated to the court that he was without counsel to defend him, but did not ask for time to procure counsel. Held, under former section, that nothing short of refusal by the court, on application for time to procure counsel will justify a conclusion that defendant was denied his constitutional right to counsel. State v. Fowler, 59 M 346, 354, 196 P 992.

Where accused did not move to have the minutes of the court corrected to show, as he claimed, that he was arraigned be-

fore he was advised of his right to counsel, contrary to former section, his affidavit contradicting the court minutes in that regard, held insufficient, in the absence of a showing of prejudice, to overcome the presumption that the court performed its judicial duty seasonably and with due regularity. State v. Murphy, 68 M 427, 429, 219 P 629.

Accused was not entitled to habeas corpus on ground that district court did not advise him of his rights or appoint counsel for him, as required by former section, where there was no showing of prejudice sufficient to overcome presumption that court had performed its duty and where contention had not previously been raised before supreme court even though more than two years and ten months had elapsed since arraignment. In re Diserly's Petition, 140 M 219, 370 P 2d 763, 764.

Confession in Absence of Counsel

Confession made after three hours' interrogation of accused who was advised of his right to counsel and his right to remain silent was not rendered inadmissible by absence of counsel where accused never requested assistance of counsel and confession was voluntarily given. State v. White, 146 M 226, 405 P 2d 761.

Court-Appointed Counsel

Where counsel was appointed by the court, after withdrawal of defendant's original counsel, but trial was commenced three days after such appointment, such appointment was made purposeless as it is the duty of the court to make the appointment effective by giving a reasonable time for the preparation of the case. State v. Blakeslee, 131 M 47, 306 P 2d 1103, 1107.

Justice Courts

Held, under former section, that since district courts lack supervisory control over justice courts, district court could not appoint counsel for indigent charged with crime of petit larceny and therefore compensation could not be awarded attorney who defended him. State ex rel. Johnson v. District Court, 147 M 263, 410 P 2d 933.

Right To Appoint Counsel

Held, under former section, that as there is no provision for appointment of counsel in the supreme court, such appointments are made by the district courts. In re Pelke's Petition, 139 M 354, 365 P 2d 932, 935; Brown v. State, 140 M 289, 371 P 2d 262, 263.

Collateral References

Criminal Law 231. 22 C.J.S. Criminal Law §§ 302, 339. 21 Am. Jur. 2d 334 et seq., Criminal Law, § 309 et seq.

Duty to advise accused as to right to assistance of counsel. 3 ALR 2d 1003.

Law Reviews

Elison, Assigned Counsel In Montana: The Law and The Practice, 26 Mont. L. Rev. 1 (1964).

Right to Counsel During Police Interrogation: An Intrinsic Right? (State v. White, 146 M 226, 405 P 2d 761) 27 Mont. L. Rev. 84 (1965).

95-1002. Waiver of counsel. A defendant may waive his right to counsel except that in all felony cases where the defendant is under eighteen (18) years of age the defendant shall be represented by counsel at every stage of the proceedings.

History: En. 95-1002 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The court may appoint counsel where the defendant lacks the intelligence or education to realize the importance of an attorney in the defense of a criminal charge, even though the defendant is over eighteen and waives counsel.

Waiver of Right to Counsel

The right to counsel may be intelli-

gently waived by an accused, and the determination of whether the waiver was intelligently made will depend upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. Petition of Jones, 143 M 19, 386 P 2d 747.

Right to counsel may be knowledgeably waived by a defendant competent to do so and who has been fully informed of his right by the court. Nelson v. State, 144 M 439, 397 P 2d 700.

95-1003. Duration of appointment. Where counsel has been assigned, such assignment shall be effective until final judgment, including any proceeding upon direct appeal, unless relieved by order of the court.

History: En. 95-1003 by Sec. 1, Ch. 196, L. 1967.

Perfection of Appeal

Where district court appointed counsel for the defendant and ordered preparation of the record for an appeal to the supreme court, all at public expense, de-

fendant having had no voice in the choice, in the interest of justice it was incumbent upon the supreme court to consider the contended errors although court-appointed counsel failed to timely file the notice of appeal. State v. Frodsham, 139 M 222, 362 P 2d 413, 418.

95-1004. Appointment after trial. Any court of record may assign counsel to defend any defendant, petitioner, or appellant in any post conviction criminal action or proceeding if he desires counsel and is unable to employ counsel.

History: En. 95-1004 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, L. 1967.

95-1005. Remuneration of appointed counsel. Whenever, in a criminal action or proceeding, an attorney at law represents or defends any person by order of the court, on the ground that the person is financially unable to employ counsel, such attorney shall be paid for his services such sum as a district court or justice of the state supreme court certifies to be a reasonable compensation therefor and shall be reimbursed for reason-

able costs incurred in the criminal proceeding. Such costs shall be chargeable to the county in which the proceeding arose.

History: En. 95-1005 by Sec. 1, Ch. 196, L. 1967.

Appointment of More Than One Counsel

Under former section providing that when an attorney by order of court de-fends an indigent, the county is liable for the attorney's fee to be fixed by the court not exceeding \$100 in a capital case, the court was not limited to the appointment of one attorney but might appoint more if the gravity of the offense warranted it, and if so each would be entitled to compensation. Huntington v. Yellowstone County, 80 M 20, 25, 257 P 1041.

DECISIONS UNDER FORMER LAW

Justice Courts

Held, under former section, that the payment of compensation to attorneys charged with defense of indigents is limited to actions "in the district court," which

clearly indicates that the legislature did not mean to provide counsel to the indigent in misdemeanor cases in justice courts. State ex rel. Johnson v. District Court, 147 M 263, 410 P 2d 933.

95-1006. Public defender's office. Any county through its board of county commissioners, may provide for the creation of a public defender's office and the appointment of a salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel. The costs of such office shall be at county expense.

History: En. 95-1006 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides a general framework for a public defender system if a particular county should desire such a system.

CHAPTER 11

BAIL

Section 95-1101. Purpose. Who may admit to bail. 95-1102. Setting and accepting bail in minor offenses. Setting and accepting bail under a warrant of arrest. Giving bail before another court or judge. 95-1103. 95-1104. 95-1105. 95-1106. Release on own recognizance. 95-1107. Issuance of warrant. 95-1108. Bailable offenses. 95-1109. Bail after conviction. Determining the amount of bail. 95-1110. Reduction, increase, revocation or substitution of bail. 95-1111. How bail is to be furnished. 95-1112. Qualifications of bail. 95-1113. Bail, how to justify. Surrender of defendant. 95-1114. 95-1115. Conditions of bail, when performed—when not performed. 95-1116. Disposition of judgment and execution. 95-1117.

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95-1101. Purpose. Bail is the security given for the purpose of insuring the presence of the defendant in a pending criminal proceeding.

History: En. 95-1101 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section sets out the purpose of bail and is intended to discourage the use of the bail mechanism for any other purpose, such as preventive detention or a "taste of jail."

- 95-1102. Who may admit to bail. (a) Any judge may admit any defendant properly appearing before him in such proceeding to bail. When bound over to any court or judge having jurisdiction of the offense charged, bail shall be continued provided the court or judge having jurisdiction may increase, reduce or substitute bail. On appeal, any judge before whom the trial was had, or any judge having the power to issue a writ of habeas corpus, may admit the defendant to bail.
- (b) Upon allowance and acceptance of bail the defendant, if he is in custody, must be discharged.

History: En. 95-1102 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-8401, 94-8601, and 94-8405.

When Bail Proper

Bail is properly allowed in a homicide case, in absence of a showing, by the county attorney, that the proof of the defendant's guilt was evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 507, 90 P 513.

Collateral References

Bail 46, 47, 48.

6 C.J.S. Árrest § 17; 8 C.J.S. Bail §§ 38-43.

8 Am Jur. 2d, Bail and Recognizance, p. 787 et seq., § 8 et seq.; p. 794, § 18.

Constitutional right to bail pending appeal from conviction. 19 ALR 807 and 77 ALR 1235.

Bail pending appeal from conviction. 45

Supersedeas, stay or bail, upon appeal in habeas corpus. 63 ALR 1460 and 143 ALR 1354.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to juvenile delinquency act. 160 ALR 287.

Court's power and duty, pending determination of habeas corpus proceedings on merits, to admit petitioner to bail. 56 ALR 2d 668.

DECISIONS UNDER FORMER LAW

Construction

Former section held to mean that committing magistrate might approve and accept the undertaking which he had himself required by his order made upon holding the defendant to answer. Any other construction would have, at times, infringed seriously upon a prisoner's right to bail. Magistrate had such power until the district court obtained final jurisdiction of the entire matter upon filing of information or presentment of indictment, or until district or supreme court judge fixed anew the prisoner's bail. State v. Lagoni, 30 M 472, 76 P 1044.

Party Plaintiff in Action on Bond

In action on bail bond in form prescribed by repealed section, running to the state, the state and not the county was the proper party plaintiff, though, under former statute, the money recovered went to county and not to state. County of Wheatland v. Van, 64 M 113, 116, 207 P 1003.

Verbal Order of Release

Fact that magistrate made verbal order of release, instead of signing order as required by former statute, was no defense to a surety in action on the bail bond. State v. Lagoni, 30 M 472, 481, 76 P 1044.

95-1103. Setting and accepting bail in minor offenses. A justice of the peace or police judge may in his discretion establish and post a schedule

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of eash bail for offenses not amounting to a felony. A peace officer may accept bail in behalf of the justice of the peace or police judge in accordance with the schedule. In the event the peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or police judge before whom the offender is to appear, and the justice of the peace or police judge shall give a receipt to the peace officer for the bail delivered.

History: En. 95-1103 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This provision establishes a constitutional procedure for the determination, acceptance, and forfeiture of bail for certain minor offenses such as traffic, fish and game, and liquor violations. In order to comply with the constitutional requirements, bail must be set by a judicial

The schedule shall establish what is

acceptable for bail, i.e., cash, checks, or other collateral. Further, it may include the release of an individual on his own recognizance, if the judge desires.

Cross-References

Patrolmen, power to fix and accept bail, sec. 31-112.

Collateral References

Bail \$\infty 48.

6 C.J.S. Arrest § 17; 8 C.J.S. Bail §§ 34-

95-1104. Setting and accepting bail under a warrant of arrest. A peace officer may accept cash bail in behalf of a judge where the warrant of arrest specifies the amount of bail. In the event the peace officer accepts bail, he shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the justice of the peace or police judge before whom the offender is to appear, and the justice of the peace or police judge shall give a receipt to the police officer for the bail delivered.

History: En. 95-1104 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The only difference between this pro-

vision and section 95-1103 is that the bail is on the warrant of arrest and a bail schedule is not needed. The warrant need not specify bail, and if it does, the peace officer need not accept it.

95-1105. Giving bail before another court or judge. The defendant, when arrested for a bailable offense must be taken without unnecessary delay before the nearest or most accessible judge in order that bail may be fixed. If the defendant is brought before a judge other than the court in which the charge is pending, the judge must establish and accept bail and set the time for the appearance of the defendant in the court in which the charge is pending. Upon acceptance of bail, the judge must deliver the bail without delay to the court in which the charge is pending.

History: En. 95-1105 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947,

sections 94-6507 to 94-6510.

Collateral References Bail \$\infty 47, 48. 8 C.J.S. Bail §§ 39-43.

95-1106. Release on own recognizance. Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

History: En. 95-1106 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section does not provide that all indigents or other defendants will automatically be at liberty pending trial. The court has discretion to grant pretrial freedom on personal recognizance. The decision by the court should only be made after investigation.

The scope of personal recognizance covers an accused who might be too poor a risk to grant pre-trial freedom unless provisions are made for additional supervision. An example would be to allow an accused person freedom pending trial on the condition he "check in" every day or remain in jail when not at work.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-2.

- 95-1107. Issuance of warrant. (a) Upon failure to comply with any condition of a bail or recognizance, the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or on his own recognizance.
- On verified application by the state, setting forth facts or circumstances constituting a breach or threatened breach of any of the conditions of the bail or a threat or an attempt to influence the pending proceeding, the court may issue a warrant for the arrest of the defendant.
- Upon the arrest, the defendant shall be brought before the court without unnecessary delay and the court shall conduct a hearing and determine bail in accordance with section 95-1111.

History: En. 95-1107 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section covers every case of noncompliance with the conditions of the bail bond and is in addition to any other provision for notice, forfeiture, or imprisonment.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-3.

Collateral References

Bail 75; Criminal Law 263.

8 C.J.S. Bail §§ 51 (2), 82; 22 C.J.S. Criminal Law § 404. 8 Am. Jur. 2d 848 et seq., Bail and Recognizance, § 114 et seq.

Arrest of one released on bail. 62 ALR 462.

95-1108 Bailable offenses. (a) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.

On the hearing of an application for admission to bail made before or after indictment or information for a capital offense, the burden of showing that the proof is evident or the presumption great that the defendant is guilty of the offense is on the state.

History: En. 95-1108 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The county attorney, if he resists an application for bail in a capital case, must make some showing that the proof is evident or the presumption great, thus bringing the case within the exception.

Cross-References

Bailable offenses, Mont. Const. Art. III, § 19.

Discretion of Trial Court

Bail is a matter within the discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion appears. State v. London, 131 M 410, 310 P 2d 571, 580.

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Denial of bail could not be claimed as showing prejudice by trial judge for such is a mere preliminary matter and has nothing to do with the trial on the merits. State v. London, 131 M 410, 310 P 2d 571, 580.

Collateral References

Bail \$\infty 43.

8 C.J.S. Bail §§ 34, 35.

8 Am. Jur. 2d 790 et seq., Bail and Recognizance, § 12 et seq.

Denial of opportunity to give bail as supporting action for false imprisonment. 79 ALR 13.

Necessity of reference to specific crime

in bail bond. 103 ALR 535.

Rape as bailable offense. 118 ALR 1115. Bail pending determination of psychopathy under statutes relating to sexual psychopaths. 24 ALR 2d 373.

Bail for person charged with bribery in athletic contest. 49 ALR 2d 1238.

Insanity of accused as affecting right to bail in criminal case. 11 ALR 3d 1385.

- 95-1109. Bail after conviction. After conviction of an offense not punishable by death, a defendant who intends to appeal may be admitted to bail:
- (a) As a matter of right, from a judgment imposing a fine only; or any judgment rendered by a justice or police court.
 - (b) As a matter of discretion in all other cases.

History: En. 95-1109 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8305.

Abuse of Discretion

District court did not abuse its discretion when it refused to fix bail on appeal of defendant sentenced to state prison. Bubnash v. State, 139 M 639, 366 P 2d 867.

Collateral References

Bail 34; Criminal Law 999 (1) (2). 8 C.J.S. Bail §§ 36 (8), 65 et seq. 8 Am. Jur. 2d 806 et seq., Bail and Recognizance, § 39 et seq.

Constitutional right to bail pending appeal from conviction, 19 ALR 807 and 77 ALR 1235.

Bail pending appeal from conviction. 45 ALR 458.

- 95-1110. Determining the amount of bail. In all cases that bail is determined to be necessary, bail must be reasonable in amount and the amount shall be:
- (a) Sufficient to assure compliance with the conditions set forth in the bail;
 - (b) Not oppressive;
 - (c) Commensurate with the nature of the offense charged;
 - (d) Considerate of the financial ability of the accused;
- (e) Considerate of the defendant's prior record, employment status, and family background.

History: En. 95-1110 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section is intended to eliminate the practice of automatically setting bail entirely on the basis of the crime involved. Other factors might indicate the defendant is a "good risk."

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-5.

Cross-References

Excessive bail prohibited, Mont. Const. Art. III, § 20.

Amount of Bail

The trial judge, in determining the

amount of bail to be fixed, should take into consideration the enormity of the crime charged; the maximum penalty which the law authorizes; the pecuniary condition of the defendant; the probability of the defendant's flight to avoid punishment; his general character and reputation; the apparent nature and strength of the proof as bearing upon the probability of his conviction; and other matters bearing upon the particular case. State v. McLeod, 131 M 478, 311 P 2d 400, 407.

The amount of bail which the judge may fix is within his sound legal discretion, and is always to be a reasonable amount. State v. McLeod, 131 M 478, 311 P 2d 400, 407.

Collateral References

Amount of bail required in criminal action. 53 ALR 399.

Factors in fixing amount of bail in criminal cases. 72 ALR 801.

Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case. 29 ALR 2d 945.

- 95-1111. Reduction, increase, revocation or substitution of bail. (a) Upon application by the state or the defendant the court before which the proceeding is pending may increase, or reduce the amount of bail, substitute one bail for another or alter the conditions of the bail, or revoke bail.
- (b) Reasonable notice of such application must be given to the opposing parties or their attorneys by the applicant after verdict of guilty and before judgment.

History: En. 95-1111 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Both the state and the defendant must have notice of any proposed change in the status of the bail and either side may move for a change in the bail. This applies to all stages of the proceedings.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-6; and Revised Codes of Montana 1947, sections 94-8307 and 94-8507.

Amount of Bail

Court did not err in refusing defend-

ant's motion to reduce bail which was initially set at \$25,000, where the person assaulted was in a very precarious condition and it was not known whether he would live or die. When the judge was advised that the victim would probably live, he reduced the bail to \$7,500 which was a very reasonable amount. State v. McLeod, 131 M 478, 311 P 2d 400, 407, 408.

Collateral References

Bail 53; Habeas Corpus 33.
8 C.J.S. Bail §§ 49, 51 (1).
8 Am. Jur. 2d 822 et seq., Bail and Recognizance, § 68 et seq.

- 95-1112. How bail is to be furnished. Bail may be furnished by the defendant in any of the following ways:
- (a) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, stocks, or bonds, or any combination thereof approved by the judge; or
- (b) By real estate situated in this state with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail; or
- (c) By written undertaking executed by the defendant and by two (2) sufficient sureties; or
- (d) By a commercial surety bond executed by the defendant and by a qualified agent for and on behalf of such surety company.

History: En. 95-1112 by Sec. 1, Ch. 196, L. 1967.

Liberty Bonds as Bail

One depositing Liberty bonds as bail was estopped from claiming that their forfeiture was unauthorized, under former section stating that a "sum" might be deposited in lieu of giving bail, on theory that money only could be given when she had stipulated at the time bail was furnished that the bonds were substantially the equivalent of the amount fixed as bail in money or cash. Kirschbaum v. Mayn, 76 M 320, 329, 246 P 953.

Where a prisoner for whom bail was furnished by plaintiff by a deposit of

Liberty bonds was in court in the custody of the sheriff and released at once, the fact that a certificate of the deposit was not delivered to the officer as required by former section as authority for releasing him, was immaterial. Kirschbaum v. Mayn, 76 M 320, 329, 246 P 953.

Collateral References

Bail€=73.

8 C.J.S. Bail §§ 52, 53.

8 Am. Jur. 2d 831, Bail and Recognizance, §§ 84-85.

Mandamus to compel approval of bonds by justice of the peace. 92 ALR 1211.

- 95-1113. Qualifications of bail. (a) If the bail is stock or bonds or both, the accused or sureties shall file a sworn schedule which shall contain a list of the stocks and bonds deposited describing each in sufficient detail that it may be identified and the market value of each stock or bond and the total market value of the stocks or bonds listed.
- (b) If the bail is real estate, the accused or sureties shall file a sworn schedule which shall contain a legal description of the real estate, a description of any and all encumbrances on the real estate including the amount of each and the holder thereof, and the market value of the unencumbered equity owned by the affiant.

A certified copy of the schedule of real estate shall be filed immediately by the court in the office of the clerk and recorder of the county in which the property is situated, and the state shall have a lien on such real estate from the time the copies are filed. The clerk and recorder shall enter, index and record such schedules without requiring any fee.

(c) If the bail is a written undertaking with sureties, each surety must be a resident or freeholder within the state.

They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking if the whole justification be equivalent to that of sufficient bail.

(d) If the bail is a commercial surety bond, it may be so done by any domestic or foreign surety company which is qualified to transact surety business in this state.

History: En. 95-1113 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Source: Revised Codes of Montana 1947, section 94-8403.

Collateral References

Bail € 55. 8 C.J.S. Bail § 60.

Lien or encumbrance on his real property as affecting qualification of surety on bail bond. 56 ALR 1097.

95-1114. Bail, how to justify. The sureties must, in all cases, justify by sworn affidavit that they each possess the qualifications provided in the preceding section. The court may further examine the sufficiency of the bail, upon oath, in such manner as it may deem proper. In all cases the state may challenge the bail or the sufficiency of the sureties.

History: En. 95-1114 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8404.

Collateral References

Bail \$\infty\$60.

8 C.J.S. Bail §§ 55, 60.

8 Am. Jur. 2d 829 et seq., Bail and Recognizance, § 81 et seq.

Liability on bail bond taken without authority. 34 ALR 612.

Necessity of acknowledgment of bail bond in open court. 38 ALR 1108.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties. 23 ALR 2d 803.

95-1115. Surrender of defendant. At any time before the forfeiture of bail, the defendant may surrender himself to the officer to whose custody he was committed at the time of giving bail.

At any time before the forfeiture of bail, the sureties or surety company may surrender the defendant to the officer to whose custody he was committed and for this purpose may, themselves, arrest the defendant or by written authority endorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

The officer must detain the defendant in his custody as upon commitment and shall file a certificate in the court having jurisdiction of the defendant, acknowledging the surrender. Such court may then order the bail exonerated.

History: En. 95-1115 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections: 94-8701 and 94-8702.

Collateral References

Bail€=80.

8 C.J.S. Bail §§ 87, 92. 8 Am. Jur. 2d, Bail and Recognizance, p. 848 et seq., § 114 et seq.; p. 854 et seq., § 129 et seq.

Surrender of principal by sureties on bail bond. 3 ALR 180 and 73 ALR 1369.

Passing indictment to the files as discharging bail. 18 ALR 1154.

Stage of proceedings at which sureties on bail bond are discharged in criminal case. 20 ALR 594.

Imprisonment of principal in another jurisdiction as releasing surety on bail bond, 26 ALR 412.

Escape of principal during his detention on separate charge as affecting liability of bail. 45 ALR 1037.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 ALR 420.

95-1116. Conditions of bail, when performed—when not performed.

- When the conditions of bail have been performed and the accused has been discharged from his obligations in the cause, the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail is real estate, the court shall notify, in writing, the county clerk and recorder and the lien of the bail bond on the real estate shall be discharged. If the bail is a written undertaking or a commercial surety bond, it shall be discharged and the sureties exonerated.
- (b) If the accused does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited.

If such forfeiture is declared by a district court, notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address.

(c) If at any time within thirty (30) days after the forfeiture the defendant or his bail appear and satisfactorily excuse his negligence or failure to comply with the conditions of the bail, the court, in its discretion, may direct the forfeiture of the bail to be discharged upon such terms as may be just.

If such forfeiture is declared by a district court and if the forfeiture is not discharged as provided in this section, the court shall enter judgment for the state against the accused and his sureties for the amount of the bail and costs of the proceedings.

History: En. 95-1116 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-8(f) and (g).

Cross-Reference

Penalty assessment on forfeiture of bail for traffic offenses, sec. 75-5304.

Forfeiture

In a suit to recover the amount of a bond for failure of a defendant to appear BAIL

at the district court in accordance with the condition of the bond it is not necessary to allege in the complaint that the defendant made default of appearance "without excuse." State v. Wrote, 19 M 209, 47 P 898.

Where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, former section governing forfeiture was sufficiently complied with. State v. Lagoni, 30 M 472, 480, 76 P 1044.

While the district court may summarily enter judgment against the person charged with crime who fails to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than to authorize proceedings by the county attorney against the sureties by proper action, and at once enters judgment against them for the amount of the bond. State ex rel. Van v. District Court, 54 M 577, 579, 172 P 540.

Collateral References

Bail 74, 75, 77 (2), 79 (1). 8 C.J.S. Bail §§ 52, 53, 76, 91, 92. 8 Am. Jur. 2d 853 et seq., Bail and Recognizance, § 126 et seq.

Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8 ALR 371; 147 ALR 1428; 151 ALR 1462 and 153 ALR 1431.

Variance between name in bail bond and in judgment of forfeiture. 20 ALR

Imprisonment of principal in another jurisdiction as releasing sureties on his bail bond. 26 ALR 412.

Constitutionality of statute relieving against forfeiture of bail or recognizance. 43 ALR 1233.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 ALR 420.

Excuse for failure of accused to appear which will entitle surety to relief from forfeiture 84 ALR 440 443

forfeiture. 84 ALR 440, 443.

Discharge, suspension, or remission of bail by reason of imprisonment of principal for a different offense. 4 ALR 2d 443.

Death of principal as ground for release

of sureties on bail or appearance bond. 63 ALR 2d 830.

DECISIONS UNDER FORMER LAW

Failure to Record Default

Under former statute providing that no action on bond would be barred by failure to record default, held that an averment in the complaint that the defendant was

called and failed to appear in the district court was equivalent to an averment that his default for not appearing was entered of record. State v. Wrote, 19 M 209, 47 P 898.

- 95-1117. Disposition of judgment and execution. (a) If judgment be rendered or the forfeiture not discharged, and the defendant has deposited money as bail, the court with whom it is deposited must, immediately after receiving notice of said judgment or order of forfeiture, pay over the money deposited to the treasury of the city or county wherein the bail was taken.
- (b) When judgment is entered in favor of the state, or the order of forfeiture is not discharged on any bail, execution may be issued forthwith for levy on stocks or bonds deposited with the court or upon the real estate described in the bail schedule. Such stocks, bonds and real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy all court costs and prior encumbrances, if any, and from the balance a sufficient sum to satisfy the judgment or forfeiture shall be paid into the treasury of the city or county wherein the bail bond was taken. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after execution sales in civil actions.
- (c) When judgment is entered in favor of the state and against the sureties or the surety company or when the forfeiture has not been dis-

charged, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

History: En. 95-1117 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-8(h).

Collateral References

Bail 77, 83, 93.

8 C.J.S. Bail §§ 52, 53, 89, 96, 106.

8 Am. Jur. 2d 860 et seq., Bail and Recognizance, § 139 et seq.

Failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite arraignment and plea. 90 ALR 298.

- 95-1118. Conditions of bail. (a) If a person is admitted to bail before conviction, the conditions of bail bond shall be that he will appear to answer in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged on final order of the court and not depart this state without leave, and subject to any other conditions as the court may reasonably prescribe to assure his appearance when required.
- (b) If the defendant is admitted to bail after conviction, the conditions of bail bond shall be that:
 - (1) He will duly prosecute his appeal;
 - (2) He will appear at such time and place as the court may direct;
 - (3) He will not depart this state without leave of the court; and
- (4) If the judgment is affirmed or the cause reversed and remanded for a new trial, he will forthwith surrender to the officer from whose custody he was bailed.

History: En. 95-1118 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section does not limit the conditions that may be imposed under section 95-1106.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-10; and Revised Codes of Montana 1947, section 94-8306.

Collateral References

Bail pending appeal from conviction. 45 ALR 458.

95-1119. Bail on a new trial. If the judgment of conviction is reversed and the cause remanded for a new trial, the trial court may order that the bail stand pending such trial, substitute, reduce, or increase bail.

History: En. 95-1119 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-11.

95-1120. Persons prohibited from furnishing bail security. No attorney at law and no official authorized to admit another to bail shall act as surety or furnish bail.

History: En. 95-1120 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 110-13.

95-1121. Sureties for guaranteed arrest bond certificates—filing of undertaking—guaranteed arrest bond certificate. (a) Any domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not to exceed one hundred dollars (\$100.00) with respect to any guranteed arrest bond certificates issued in such year by an automobile club or association or by an insurance company authorized to write automobile liability insurance

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within this state, by filing with the commissioner of insurance an undertaking thus to become surety.

- (b) Such undertaking shall be in form to be prescribed by the commissioner and shall state the following:
- (1) The name and address of the automobile club or clubs, automobile association, or insurance company or companies, or associations with respect to the guaranteed arrest bond certificates of which the surety company undertakes to be surety.
- (2) The unqualified obligation of the surety company to pay the fine or forfeiture in an amount not to exceed one hundred dollars (\$100.00) of any person who, after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.
- (c) The term guaranteed arrest bond certificate, means any printed card or other certificate issued by an automobile club, association or insurance company, to any of its members or insureds, which said card or certificate is signed by such member or insured and contains a printed statement that such automobile club, association, or insurance company and a surety company, or an insurance company authorized to transact both automobile liability insurance and surety business in the state of Montana, guarantee the appearance of the person whose signature appears on the card or certificate and that will, in the event of failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed one hundred dollars (\$100.00).

History: En. 95-1121 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8508.

Cross-References

Sureties for guaranteed arrest bond certificates, filing of undertaking, definition of guaranteed arrest bond certificate, sec.

Violations of motor vehicle laws—posting of guaranteed arrest bond certificate in lieu of cash. Any guaranteed arrest bond certificate with respect to which a surety company has become surety or a guaranteed arrest bond certificate issued by an insurance company authorized to transact both automobile liability insurance and surety business within this state, as provided in section 95-1121, hereof, shall, when posted by the person whose signature appears thereon, be accepted in lieu of cash bail in an amount not to exceed one hundred dollars (\$100.00) as a bail bond to guarantee the appearance of such person, in any court, including municipal courts, in this state, at such time as may be required by the court, when such person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on such guaranteed arrest bond certificate so posted as a bail bond in any court in this state shall be subject to the forfeiture and enforcement provisions with respect to bail bonds posted in criminal cases as provided by law, and that any such guaranteed arrest bond certificate posted as bail bond in any municipal court in this state shall be subject to the forfeiture and enforcement provisions of the chapter or ordinance of the particular municipality pertaining to bail bonds posted.

History: En. 95-1122 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8509.

Cross-References

Violations of motor vehicle laws, posting of guaranteed arrest bond certificate in lieu of cash, sec. 94-8509.

95-1123. Certification of names of sureties — withdrawal by surety company. The commissioner of insurance shall certify to each justice of the peace, police magistrate and district judge the names of surety companies who have become sureties with respect to guaranteed arrest bond certificates, and shall likewise immediately notify such official upon the withdrawal of such company as surety. No such withdrawal by any company shall be effective for thirty (30) days after the filing thereof with the state insurance commissioner.

History: En. 95-1123 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8510.

Cross-References

Certification of names of sureties, withdrawal by surety company, sec. 94-8510.

Collateral References

Bail \$\infty 60.

8 C.J.S. Bail §§ 55, 60, 72.

8 Am. Jur. 2d, Bail and Recognizance, p. 785 et seq., § 7 et seq.; p. 821, § 65.

Validity, construction, and application of statutes regulating bail bond business. 13 ALR 3d 618.

CHAPTER 12

PRELIMINARY EXAMINATION

Section 95-1201. Definition of preliminary examination.

95-1202. Proceedings at the preliminary examination.

95-1203. Exclusion and separation of witnesses.

95-1204. Recognizance by or deposition of witness.

95-1201. Definition of preliminary examination. A preliminary examination is a hearing before a justice of the peace for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant.

History: En. 95-1201 by Sec. 1, Ch. 196, L. 1967.

cases of felony, Mont. Const. Art. VIII, § 21.

Cross-References

Justices of the peace, examining court in

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

- 95-1202. Proceedings at the preliminary examination. (a) fendant shall not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses shall be examined in the presence of the defendant. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears that there is probable cause to believe that an offense has been committed by the defendant the judge shall hold him to answer to the court having jurisdiction of the offense; otherwise, the judge shall discharge him.
- If the defendant waives preliminary examination the judge shall hold him to answer to the court having jurisdiction of the offense.

- (e) The judge may in his discretion and must upon the request of the defendant, exclude from the preliminary examination every person not officially associated with the case before the court.
- (d) The testimony of each witness, in case of homicide, must be reduced to writing, as a deposition, by a court appointed stenographer; in cases other than homicide the testimony of each witness shall be taken by a court appointed stenographer upon demand by the county attorney, or the defendant, or the defendant's counsel. After concluding the proceeding if the judge holds the defendant to answer he shall transmit forthwith to the clerk of the court having jurisdiction of the offense all papers in the proceeding and any bail taken by him.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The preliminary examination is not a trial of the issues of the case, nor is it a part of the trial. It should not be confused with the arraignment which is detailed in Chapter 16. It is a preliminary procedure for determining whether there is "probable cause to believe a felony has been committed by the defendant." Nothing more is required.

Nothing more is required.

The state is committed to this means of initiating a prosecution once a preliminary examination has begun. However, simply scheduling a preliminary hearing after the initial appearance does not commit the prosecution to this procedure. One of the other alternatives may be employed, i.e., leave to file an information or grand jury indictment.

jury indictment.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 109-3.

Evidence of Discharge

The best evidence of plaintiff's discharge after preliminary examination on a charge of grand larceny was the endorsement on

the warrant on which he was arrested, and not the entries on the magistrate's docket; but, upon proof of the loss of the warrant, parol evidence was admissible to prove the fact of his discharge. Hawley v. Richardson, 60 M 118, 126, 198 P 450.

Probable Cause

On a preliminary examination, all that is required of the county attorney is to submit proof sufficient to show probable cause to believe the defendant to be guilty of the charge. In re Jones, 46 M 122, 126, 126 P 929.

Collateral References

Criminal Law 222, 228, 229, 238. 22 C.J.S. Criminal Law 300 et seq. 21 Am. Jur. 2d 445-453, Criminal Law, 442-451.

Bail, termination of liability of sureties by appearance of principal at preliminary examination. 20 ALR 597.

Pre-conviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR 3d 404.

95-1203. Exclusion and separation of witnesses. During the examination of any witness or when the defendant is making a statement or testifying the judge may, and on the request of the defendant or state shall, exclude all other witnesses. He may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

History: En. 95-1203 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 109-3; and Revised Codes of Montana 1947, sections 94-6109 and 94-6110.

95-1204. Recognizance by or deposition of witness. If the defendant is held to answer after a preliminary examination or after the defendant has waived a preliminary examination or after the district court has granted leave to file an information or after an indictment has been returned, the judge may require:

- (a) Any material witness for the state or defendant to enter into a written undertaking;
 - (1) To appear at the trial, and
- (2) May provide for the forfeiture of a sum certain in the event the witness does not appear at the trial.
- (b) Any witness who refuses to enter into a written undertaking may be remanded to custody but shall not be held longer than is necessary to take his deposition.

After the deposition is taken the witness must be immediately discharged.

(c) Such deposition must be taken in the presence of the county attorney and the defendant and his counsel, unless either the county attorney or the defendant and his counsel fail to attend after reasonable notice of the time and place set for taking the deposition.

History: En. 95-1204 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The court may retain witnesses for the defendant as well as for the state. The section is a partial duplication of section 95-1802.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 109-3.

Cross-References

Depositions in criminal proceedings, Mont. Const. Art. III, § 17.

Effect upon Rights of Accused

Accused's rights were not violated on theory that witness was intimidated into giving damaging testimony against accused by county attorney's threat to hold witness unless she gave a statement where the witness gave a statement, in which she alleged she had given defendant money to buy a six-shooter. Petition of Gallagher, 150 M 476, 436 P 2d 530.

Collateral References

Bail \$\infty 49; Depositions \$\infty 11; Witnesses \$\infty 19.

26 C.J.S. Depositions §§ 5, 6, 16; 97 C.J.S. Witnesses § 3 et seq.

CHAPTER 13

LEAVE TO FILE INFORMATION AND TIME FOR FILING INFORMATION

Section 95-1301. Leave to file information.

95-1302. Time for filing the information.

95-1303. The county attorney not filing an information.

- 95-1301. Leave to file information. (a) The county attorney may apply directly to the district court for permission to file an information against a named defendant. The application must be by affidavit supported by such evidence as the judge may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant the judge shall grant leave to file the information, otherwise the application shall be denied.
- (b) When there has been granted leave to file an information against the defendant, a warrant may issue for his arrest and he must be brought before the court, unless the court orders otherwise.
- (c) If the person against whom an information is sought to be filed is a district court judge, the county attorney shall apply directly to the supreme court for permission to file the information. The supreme court shall then proceed in the manner provided in section 95-1301 (a).

When leave is granted by the supreme court it shall designate and direct a judge of the district court of another district to preside at the trial of such information, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment. All necessary records shall be transferred to the clerk of the district court of the district in which the action arose.

History: En. 95-1301 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This operates as a substitute for a preliminary examination or a grand jury investigation thereby assuring the accused that the prosecuting officer must satisfy some judicial officer as to the existence of probable cause to believe that the accused has committed an offense before any formal information can be filed against him. Obtaining leave to file an information is not a mere perfunctory matter, but rests in the sound discretion of the district judge. The application must be complete in itself, and contain such salient facts as will allow the district judge to make an independent determination that an offense has been committed. It is impossible to delineate here what facts would be necessary for all cases; however, a recitation of the fact the defendant had been arrested, that he was accused of a crime, and that there is good evidence (e.g. eyewitnesses) implicating him with the crime would seem sufficient.

Source: Revised Codes of Montana 1947, section 94-7003. See also section 95-1410 (d) (2).

Cross-References

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

Bypassing Preliminary Hearing

Leave to file an information directly, without a preliminary hearing, under the statute and constitution, was not error or abuse of the statutory privilege to bypass the preliminary hearing where the motion to file directly was supported by an affidavit and where a preliminary hearing would clearly serve no purpose nor secure an advantage to the defendant. State v. Johnson, 149 M 173, 424 P 2d 728.

Examination before Leave To File

The district court may grant leave to file an information without previous examination of defendant by a committing magistrate. State v. Vuckovich, 61 M 480, 491, 203 P 491.

Where a district judge assumed to act upon an application for leave to file an information, he should have directed an examination before himself as magistrate or some other magistrate. State ex rel. Harrison v. District Court, 135 M 365, 340 P 24 544

Granting Leave

It is only where there has been no examination or commitment by a magistrate that the county attorney must move for leave to file an information. State v. Byrd, 41 M 585, 591, 111 P 407.

Where a deputy county attorney appeared in open court and orally moved for leave to file an information presenting at the same time a written request signed by the county attorney which was filed immediately upon granting of the request, the court properly overruled defendant's motion to quash the information based upon the ground that leave to file had been granted on oral request, contrary to former section. State v. Kacar, 74 M 269, 273, 240 P 365.

Sufficiency of Facts in Information

Where the motion for leave to file the information disclosed that decedent was shot at close range with a high powered rifle and killed on defendant's farm, that the coroner's jury verdict was that the killing was intentional, that evidence of the commission of the crime and guilt of the defendant was introduced at a habeas corpus hearing, that the county attorney had made a complete investigation, and that as a result he believed the defendant was guilty, the motion was sufficient to grant leave to file information. State v. London, 131 M 410, 310 P 2d 571, 581.

Collateral References

Indictment and Information €= 1, 39, 40. 42 C.J.S. Indictments and Informations § 67 et seq.

DECISIONS UNDER FORMER LAW

Discretion of Court

Under former section providing that court might grant leave, require examination, or order filing of information, the requiring of an examination presupposed the right to grant or deny the application on examination; but the statute did not provide for findings of fact and conclusions of law. The section contemplated a requirement of sufficient evidence to move the court's discretion, but did not contemplate an unlimited discretion with finality of decision that discharged or excused a defendant from any further proceedings. State ex rel. Harrison v. District Court, 135 M 365, 340 P 2d 544.

Issuance of Warrant

Held, under former statute, that a warrant may issue on an information filed by the county attorney by leave of court on a motion in writing not verified, and the information verified only on information and belief. State v. Shafer, 26 M 11, 15, 66 P 463.

Motion for Leave

Held, under former statute, that a motion by the county attorney for leave to file an information need not set forth with technical accuracy the facts constituting a formal charge, nor, since the statements made therein are made under his official oath, is it necessary that the motion be accompanied by an affidavit. State v. Kacar, 74 M 269, 273, 240 P 365.

Secrecy

Former statute forbade, prior to arrest, not only disclosure of fact that an information had been filed, but even the fact that leave to file had been granted and also contemplated that, if the defendant was at large, the minutes of the court should be silent as to order granting

leave to file the information. State v. Bowser, 21 M 133, 138, 53 P 179.

Showing Necessary To Obtain Leave To File

The matter of obtaining leave to file an information, without a previous examination of the accused by a committing magistrate, was authorized by both constitution and former statute; it was not to be considered as a merely perfunctory one, and though the county attorney was not re-quired by former statute to support the application by affidavit or set forth therein the facts constituting the charge with technical accuracy, the showing was required to be sufficient to move the discretion of the court. In instant case, held that the motion was required to be complete in itself and not dependent on any former information which had become functus officio and not "as charged in the informa-tion as originally filed." State ex rel. Juhl v. District Court, 107 M 309, 316, 84 P 2d 979.

Writing

Where the information is filed by leave of court, it need not be entered in writing before the filing of the information; but, after the arrest of the defendant, the minutes of the court may be corrected so as to amend the order. State v. Bowser, 21 M 133, 137, 53 P 179.

95-1302. Time for filing the information. After the defendant has been examined and held to answer, or has waived preliminary examination as provided in section 95-1202 of this code, or after leave of court has been granted as provided in section 95-1301 of this code, the county attorney must file, within thirty (30) days, in the proper district court an information charging the defendant with the offense for which he is held to answer, or any other offense disclosed by the evidence. If the county attorney fails to file the information within the time specified he may be found guilty of contempt, and may be prosecuted for neglect of duty.

History: En. 95-1302 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6204.

Waiver of Irregularity

Where the county attorney fails to comply with this section, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be taken advantage of by the sureties on defendant's bail bond. State v. Lagoni, 30 M 472, 480, 76 P 1044.

The objection to failure to timely file information must be made in writing and before demurrer or plea, or it is waived; hence, where defendant did not raise such an objection to the jurisdiction of the court until after plea, and then orally, he was not in a position to complain of the action of the court in overruling his objection. State v. Chevigny, 48 M 382, 384, 138 P 257.

Writ of Supervisory Control

No leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel the granting of leave. State ex rel. Donovan v. District Court, 26 M 275, 278, 67 P 943.

Leave to file an information without a preliminary examination may be granted or refused, within the sound discretion of the court, when no statement is made to the court of the evidence upon which the state relies for a conviction, and a writ of supervisory control to revise such discretion will be denied. State ex rel. Donovan v. District Court, 26 M 275, 278, 67 P 943.

Collateral References

Indictment and Information \$\infty\$42. 42 C.J.S. Indictments and Informations

95-1303. The county attorney not filing an information. If the county attorney determines an information ought not to be filed after the defendant has been held to answer following a preliminary examination or waiver thereof, or after leave to file has been granted, he must within thirty (30) days make, subscribe, and file with the clerk of the court a statement in writing containing his reasons in fact and in law for not filing an information. The court must examine such statements together with the evidence filed in the case, and if upon such examination, the court is not satisfied with the statement, the county attorney shall be directed and required by the court to file the proper information and bring the case to trial.

History: En. 95-1303 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6206.

Revised Commission Comment

Since the entry of a nolle prosequi is abolished, neither the attorney general nor the county attorney can discontinue or abandon a prosecution of a public offense, except as provided in this section.

Collateral References

Indictment and Information 39, 41

42 C.J.S. Indictments and Informations §§ 67, 70-72.

CHAPTER 14

GRAND JURY

Section 95-1401. Summoning grand juries.

Objections to grand jury and to grand jurors. 95-1402.

95-1403. Foreman.

95-1404. Charge by court.

95-1405. Powers and duties of grand jury.

When and from whom they may ask advice and who may be present 95-1406. during their sessions.

Subpoena of witnesses—issuance. Reception of evidence. 95-1407.

95-1408.

Secrecy of proceedings and disclosure. 95-1409.

95-1410. Finding and presentment of the indictment.

95-1401. Summoning grand juries. A grand jury must only be drawn and summoned when the district judge in his discretion considers a grand jury necessary and shall so order. The grand jury must consist of seven (7) persons, of whom five (5) must concur to find an indictment. The district judge may direct the selection of one (1) or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty he may be replaced by an alternate. The composition and drawing of a grand jury shall be in accordance with the provisions of sections 93-1801 to 93-1804.

History: En. 95-1401 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

At least seven jurors must be present during the entire investigation before a grand jury can return a valid indictment. If one of the regular jurors has missed part of the grand jury proceedings he shall be disqualified and dismissed and an alternate juror will be substituted by the judge. The same general procedure may be followed as is described in section 93-1811 for the selection of alternate trial jurors. In Montana, a grand jury is normally summoned to consider particular

problems and can be reconstituted to pursue another case.

Source: Revised Codes of Montana 1947, sections 94-6301 and 94-6302.

Cross-References

Composition and drawing of grand jury, secs. 93-1801 to 93-1804.

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

Collateral References

Grand Jury 3, 9.

38 C.J.S. Ğrand Juries §§ 2, 9, 14, 18. 34 Am. Jur. 2d 952 et seq., Grand Jury, § 9 et seq.

95-1402. Objections to grand jury and to grand jurors. (a) The state may challenge the panel of a grand jury on the grounds that the grand jury was not selected, drawn or summoned according to law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges may be oral or in writing and shall be tried and decided by the court. At any time for cause shown the court may excuse or discharge a juror or jurors either temporarily or permanently and in the latter event the court may impanel another person or persons in place of the juror or jurors discharged.

(b) Motion to Dismiss. A motion to dismiss the indictment may be based on the grounds that the grand jury was not selected, drawn or summoned according to law, or that an individual juror was not legally qualified. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to section 95-1403 of this code that five (5) or more jurors after deducting those not legally qualified, concurred in finding the indictment.

History: En. 95-1402 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The reasons for challenging an individual juror are not specifically enumerated but are the same as under previous law plus any other valid reasons the facts may produce. The motion to dismiss is available to persons other than the state. Both sides have the right to object.

Source: Federal Rules of Criminal Procedure, Rule 6(b)(1) and (2).

Collateral References

Grand Jury € 17, 18.

38 C.J.S. Ğrand Juries §§ 28, 29, 30. 38 Am. Jur. 2d 967 et seq., Grand Jury, § 21 et seq.

Exclusion from grand jury list of eligible class or classes of persons, effect of, and remedies for. 52 ALR 919.

Right to challenge personnel of grand jury. 169 ALR 1169.

Exclusion of attorneys from jury list in criminal cases, 32 ALR 2d 890.

95-1403. Foreman. The court shall appoint one (1) of the jurors to be foreman. The foreman shall have the power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record shall not be made public except on order of the court.

History: En. 95-1403 by Sec. 1, Ch. 196, L. 1967.

Source: Federal Rules of Criminal Procedure, Rule 6(c).

Collateral References

Grand Jury ≥ 21, 22. 38 C.J.S. Grand Juries, §§ 19, 20. 38 Am. Jur. 2d 964, Grand Jury, § 18. Coercion by foreman of jury. 97 ALR

Grand or petit jury as officer within constitutional or statutory provision in relation to eath or affirmation, 118 ALR 1098.

- 95-1404. Charge by court. (a) When the grand jury is impaneled and sworn, it shall be charged by the judge who summoned it. In doing so, the court shall give the grand jurors such information as it deems proper, or as is required by law, as to their duties, and as to any charges of public offenses known to the court and likely to come before the grand jury.
- (b) When the grand jury has been impaneled, sworn and charged, it shall retire to a private room, and inquire into the offenses cognizable by it. When the grand jury certifies completion of business before it and the court concurs, it shall be discharged by the court.

History: En. 95-1404 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The grand jury may continue to function if their business has not been completed even though the court has adjourned.

Collateral References

Grand Jury €== 23.

38 C.J.S. Grand Juries §§ 21, 32; 42 C.J.S. Indictments and Informations §§ 25, 26.

38 Am. Jur. 2d 966, Grand Jury, § 19.

DECISIONS UNDER FORMER LAW

"Final Adjournment" When Court Always Open

Under former section providing that grand jury is discharged by final adjournment of court, whether or not their business is completed, the beginning of each district court term constituted a "final ad-

journment" of the preceding term, although district court was always open and each term continued until succeeding term, the terms as fixed by the court limited the existence of the grand jury. State ex rel. Adami v. Lewis and Clark County, 124 M 282, 220 P 2d 1052.

- 95-1405. Powers and duties of grand jury. (a) The grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment.
- (b) If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he shall declare it to his fellow jurors, who shall thereupon investigate it.
 - (c) The grand jury may inquire into:
- (1) The case of every person imprisoned in the jail of the county on a criminal charge and not indicted, or against whom an information or complaint has not been filed.
- (2) The condition and management of the public prisons within the county.
- (3) The willful or corrupt misconduct in office of public officers of every description within the county.
- (d) The grand jury is entitled to free access, at all reasonable times, to the public prisons and to the examination without charge, of all public records within the county.
- (e) If, in the judgment of the grand jury, the services of an expert are necessary, the grand jury may employ one or more at an agreed compensation, to be first approved by the court. If, in the judgment of the grand jury, the services of assistants to such experts are required, the grand

jury may employ such assistants, at a compensation to be agreed upon and approved by the court.

(f) All expenses of the grand jury, including special counsel and investigators, if any, shall be paid by the treasurer of the county out of the general fund of the county upon warrants drawn by the county auditor or the clerk of the district court upon the written order of the judge of the district court of the county.

History: En. 95-1405 by Sec. 1, Ch. 196, L. 1967.

38 Am. Jur. 2d 971 et seq., Grand Jury, § 26 et seq.

Revised Commission Comment

The provision specifying the duties of the grand jury is permissive rather than mandatory. Matters within investigating powers of grand jury. 22 ALR 1356; 106 ALR 1383 and 120 ALR 437.

Contracts, power of grand jury to contract. 26 ALR 605.

Collateral References

Grand Jury 24 et seq. 38 C.J.S. Grand Juries §§ 34-36.

- 95-1406. When and from whom they may ask advice and who may be present during their sessions. (a) The grand jury may, at all times, ask the advice of the court, or the judge thereof, or the attorney general or of the county attorney. Unless such advice is asked, the judge of the court shall not be present during the sessions of the grand jury.
- (b) The county attorney of the county or the attorney general may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury, and may interrogate witnesses before the grand jury whenever he thinks it necessary. When a charge against or involving the county attorney, or deputy county attorney, or anyone employed by or connected with the office of the county attorney, is being investigated by the grand jury, such county attorney, or deputy county attorney or all or any one or more of them, shall not be allowed to be present before such grand jury when such charge is being investigated, in an official capacity but only as a witness, and he shall only be present while a witness and after his appearance as such witness shall leave the place where the grand jury is holding session.
- (c) When requested to do so by the grand jury of any county, the attorney general or county attorney may employ special counsel and investigators, whose duty it shall be to investigate and present the evidence in such investigation to such grand jury.
- (d) The grand jury or county attorney may require by subpoena the attendance of any person before the grand jury as interpreter. While his services are necessary, such interpreter may be present at the examination of witnesses before the grand jury. The compensation for services of such interpreter constitutes a charge against the county, and shall be fixed by the grand jury, in an amount to be approved by the court and paid out of the county treasury on a warrant of the county auditor upon an order of the judge of the district court.
 - (e) Transcript of Testimony.
- (1) The grand jury may appoint a stenographer to take in short-hand the testimony of witnesses or the testimony may be taken by a re-

cording device, but the record so made shall include the testimony of all witnesses on that particular investigation. The shorthand notes or the recordings and transcript of the same, if any, shall be delivered to and retained by the clerk of the district court.

(2) The stenographer and any typist who transcribes the stenographer's notes or recordings shall be sworn by the foreman not to disclose any testimony or the names of any witnesses except when so ordered by the court. The stenographic reporter shall certify and file with the clerk of the district court an original transcription of his shorthand notes and a copy thereof and as many additional copies as there are defendants. The reporter shall complete such certification and filing within ten (10) days after the indictment has been found or the accusation presented unless the court for good cause makes an order extending the time. The clerk of the district court shall deliver the original of the transcript so filed with him to the county attorney immediately upon his receipt thereof, shall retain one (1) copy for use only by judges in proceedings relating to the indictment or accusation, and shall deliver a copy of such transcript to each such defendant or his attorney.

History: En. 95-1406 by Sec. 1, Ch. 196, L. 1967.

Construction

The objects of former section, which was substantially the same as subsection (a), except that attorney general was not mentioned, were to preserve to the body alone clothed with authority of indicting for public offenses—the grand jury—a right to have witnesses interrogated by official counsel at its sessions, and to keep the proceedings of that body as secret as possible by excluding therefrom those not vested with official authority. It did not affect the right of the attorney general to be present before the grand jury. State ex rel. Nolan v. District Court, 22 M 25, 31, 55 P 916.

Special Prosecutor — Appearance before Grand Jury

County attorney cannot delegate to unofficial counsel his right to advise the grand jury, assist them in their investigations and examine witnesses, and an order of the district judges appointing such special prosecutor when the county attorney was present and able to act could not give such authority. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1051.

The appearance of "special prosecutor" before the grand jury was ground for setting aside the indictment. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

The press of business in the office of district attorney does not justify the appointment of a "special prosecutor" to appear before the grand jury. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

Collateral References

Grand Jury → 33-35. 38 C.J.S. Grand Juries § 40. 38 Am. Jur. 2d 980, Grand Jury, §§ 34-6.

95-1407. Subpoena of witnesses—issuance. A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the grand jury or by the judge of the district court, for witnesses in the state, in support of the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury upon investigation pending before them may direct.

History: En. 95-1407 by Sec. 1, Ch. 196, L. 1967.

95-1408. Reception of evidence. (a) In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses

produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in section 95-1802.

- (b) The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the county attorney to issue process for witnesses.
- (c) The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury.

History: En. 95-1408 by Sec. 1, Ch. 196, L. 1967.

Self incrimination, privilege against as to testimony before grand jury. 38 ALR

Collateral References

Indictment and Information 10. 42 C.J.S. Indictments and Informations §§ 24, 207.

95-1409. Secrecy of proceedings and disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the county attorney for use in the performance of his duty. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury under section 95-1402 (b). No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

History: En. 95-1409 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Since its inception the proceedings of the grand jury have been shrouded in secrecy. The reasons most frequently

articulated for the policy of secrecy are:
(1) to prevent the escape of those whose indictment may be contemplated;

(2) to insure the utmost freedom in grand jury deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) to prevent intimidation or tampering with witnesses to testify before the

grand jury;
(4) to encourage free disclosure by persons having knowledge of commission of crimes;

(5) to protect an innocent accused person from public knowledge that he has been under investigation.

After the grand jury has investigated an individual's activity and he has been indicted and apprehended, all of the above reasons lose most of their weight. California's actual experience indicates that the dangers of disclosure of grand jury testimony are seriously overrated. California has followed the procedure of providing the defendant in a criminal prosecution with a copy of the transcript of the grand jury testimony before trial. This law appears to have had no adverse effect, as the grand jury has remained a vital and active force in California.

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In interpreting Federal Rule 6(e) in Pittsburgh Plate Glass Co. v. Wisconsin. 360 US 395, 3 L Ed 2d 1323, 79 S Ct 1237 (1959), the United States Supreme Court decided that for disclosure to be allowed the defendant had to show some "particularized need" outweighing the policy of secrecy. This requirement leads to a complicated determination of whether complicated determination of whether

there is such a particularized need. The old trend was one of undue emphasis on the policy of secrecy which many times restricted the defendant's ability to prepare his case—this is out of step with the modern liberalization of criminal discovery.

Source: Federal Rules of Criminal Procedure, Rule 6(e).

Collateral References

Grand Jury € 341. 38 C.J.S. Grand Juries § 43.

38 Am. Jur. 2d 984 et seq., Grand Jury,

Duty of secrecy on part of members of, or witnesses or other persons present before grand jury. 127 ALR 272.

- 95-1410. Finding and presentment of the indictment. (a) An indictment cannot be found without the concurrence of at least five (5) grand jurors. When so found it must be indorsed, "a true bill," and the endorsement must be signed by the foreman of the grand jury.
 - (b) Indictment. How Presented and Filed:
- An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk.
- (2) When an indictment is filed against a district court judge, it must be transmitted directly to the supreme court, who shall thereupon designate and direct a judge of the district court of another district to preside at the trial of such indictment and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment.
- (c) If the defendant is in custody or has given bail and five (5) jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.
- When an indictment is found against a defendant, a warrant must issue for his arrest and he must be brought before the court, unless the court orders otherwise.

History: En. 95-1410 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Code of Montana, 1947, sections 94-6332, 94-6334 and 94-7003; and Federal Rules of Criminal Procedure, Rule 6(f).

Collateral References

Criminal Law 263; Indictment and Information 11 (1), (2), 33 (1), 34 (2),

22 C.J.S. Criminal Law § 404; 42 C.J.S. Indictments and Informations §§ 27 et

seq., 54, 61.
41 Am. Jur. 2d, Indictments and Information, p. 893 et seq., § 21 et seq.; p. 910, § 54.

Failure to indict as terminating liability of sureties on bail bond. 20 ALR 597.

"Infamous" offense, what is, within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1002.

Statutes regarding form of indictment as violation of constitutional requirement

of "indictment." 69 ALR 1392.

Admissibility of testimony or affidavits of grand jurors for purpose of impeaching indictment. 110 ALR 1023.

Necessity and sufficiency of jurat or certificate of officer. 116 ALR 589.

Special or additional grand jury sitting contemporaneously with regular grand jury, presentment or indictment by, as satisfying constitutional requirement of indictment by grand jury. 121 ALR 814. Right of accused to attack indictment

or information after reversal or setting aside of conviction. 145 ALR 493.

Certiorari after judgment to test sufficiency of indictment or information as regards the offense sought to be charged. 150 ALR 743.

DECISIONS UNDER FORMER LAW

Endorsement of Witnesses' Names

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, witnesses whose names were not so en-

dorsed might testify at the trial where the indictment was not found upon their testimony. But if the names of all of the witnesses upon whose testimony the indictment was found were not endorsed,

the indictment would be set aside upon timely motion. State v. McDonald, 51 M 1, 6, 149 P 279. See section 95-1503 (d).

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, held that if there were no witnesses it was the duty of the prosecution, on objection of defendant, to so state, either by a verified pleading or under oath. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1043. See section 95-1503 (d).

Former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment required the endorsement of names of all witnesses, not merely the names of witnesses the state believed to be important; on timely motion, indictment would be set aside for

failure to comply. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1041. See section 95-1503 (d).

Under former statute requiring that names of witnesses examined before grand jury be inserted at foot of indictment, held that if there were witnesses identified as John Doe and Richard Roe, it was indefensible for prosecution to conceal their identity from accused merely because prosecutor believed that disclosure of their true names was not vital or necessary to prepare a defense; on appeal, supreme court would be required to sustain conviction if possible and burden would be on accused to show prejudice. State ex rel. Porter v. District Court, 124 M 249, 290 P 2d 1035. See section 95-1503 (d).

CHAPTER 15

CHARGING AN OFFENSE

Section 95-1501. Methods of prosecution.

95-1502. Commencement of prosecutions.

95-1503. Form of charge.

95-1504. Joinder of offenses and of defendants.

95-1505. Amending the charge.

95-1506. Prior conviction.

95-1501. **Methods of prosecution**. When authorized by law a prosecution may be commenced by:

- (a) A complaint;
- (b) An information following a preliminary examination, or waiver thereof;
 - (c) An information after leave of court has been granted;
 - (d) An indictment upon a finding by a grand jury.

History: En. 95-1501 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 111-1; Montana constitution, article III, section 8.

Cross-References

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

Capital Crime May Be Charged Without Presentment or Indictment

Charges made by informations filed after a hearing before a magistrate, or by leave of the district court have long been sanctioned by statute and constitution so that a person may be held to answer for a capital crime without presentment or indictment by a grand jury. State v. Corliss, 150 M 40, 430 P 2d 632.

Filing of Information Without Preliminary Examination Permissible

The right of the court to grant leave to file an information without previous ex-

amination by a committing magistrate is settled law in this state. It is authorized by section 8, article III of the constitution, confirmed by numerous decisions of the court, and there can be no interpretation put upon any statute which will take it away. State v. Brett, 16 M 360, 40 P 873; State v. Bowser, 21 M 133, 53 P 179, 180; State v. Foot, 100 M 33, 39, 48 P 2d 1113.

Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant was formerly by way of a request for a bill of particulars. State v. Hahn, 105 M 270, 273, 72 P 2d 459.

Unverified Information

The fact that an information is not verified does not deprive the court of jurisdiction to try the case. State ex rel. Nolan v. Brantly, 20 M 173, 178, 50 P 410.

Collateral References

Indictment and Information 1, 4, 55. 42 C.J.S. Indictments and Informations §§ 6, 10, 14, 98. 41 Am. Jur. 2d 880 et seq., Indictments

and Informations, § 1 et seq.

Waiver, right to waive indictment, information, or other formal accusation. 56 ALR 2d 837.

DECISIONS UNDER FORMER LAW

Initiation of Prosecution

Prosecutions in the district court may be either by information, in cases where there has been an examination and commitment or admission to bail by magistrate, in which case an order of the court is not

necessary; or by information filed by order of the court upon the written motion of the county attorney, which may be done without such examination. State v. Bowser, 21 M 133, 134, 53 P 179. See State v. Vinn, 50 M 27, 32, 144 P 773.

95-1502. Commencement of prosecutions. (a) All prosecutions of offenses triable in the district courts shall be by indictment or information except as otherwise provided by chapter 55, Title 94, R. C. M. 1947.

All other prosecutions of offenses may be by complaint.

History: En. 95-1502 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 111-2; Montana constitution, article III, section 8.

Extent of the Term "Prosecution"

"Prosecution" as used in section 8, article III and section 27, article VIII of the constitution and former section providing that all public offenses triable in district courts must be prosecuted by indictment or information (unless within statutory exception) meant that prosecution commenced with the filing of the information or indictment, and not before. Rosebud County v. Flinn, 109 M 537, 541, 98 P 2d 330.

Collateral References

Injunctions against crime or abatement of nuisance arising from violation of liquor law, statute relating to, as authorizing punishment without indictment. 49 ALR 646.

Necessity for indictment in prosecution for driving automobile while intoxicated. 42 ALR 1512; 49 ALR 1400 and 68 ALR 1374.

95-1503. Form of charge. A charge shall:

- (a) Be in writing and in the name of the state of Montana, or in the name of a municipality if a violation of a municipal ordinance is charged,
 - (b) Specify the name of the court in which the charge is filed, and
 - Charge the commission of an offense by:
 - stating the name of the offense:
- citing in customary form the statute, rule, regulation or other provision of law which the defendant is alleged to have violated;
- (3) stating the facts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended;
- (4) stating the time and place of the offense as definitely as can be done; and
- stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.
- If the charge is by information or indictment, it shall include endorsed thereon, the names of the witnesses for the state, if known,

- (e) If the charge is by complaint it shall be signed on oath by a person having knowledge of the facts or by the county attorney; if by information, it shall be signed by the county attorney or by his deputy; if by indictment, it shall be signed by the foreman of the grand jury.
- (f) If the charge is by information or indictment it must be recorded by the clerk within five (5) days after the same is filed, in a book to be kept for that purpose. The judge must compare the record with the original indictment or information and certify the correctness thereof. In case the original is lost or destroyed, the defendant may be tried upon a copy taken from the record, and certified by the clerk.

History: En. 95-1503 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 111-3; Revised Codes of Montana 1947, sections 94-6403 through 94-6406.

Cross-References

Forgery, where instrument has been destroyed or withheld by defendant, pleading for, sec. 94-6418.

Form of information and indictment, allegation as to partnership property, sec. 94-6429.

Larceny or embezzlement, pleading for, sec. 94-6420.

Libel, pleading for, sec. 94-6417.

Perjury or subornation of perjury, pleading for, sec. 94-6419.

Presumptions of law, etc., need not be stated in indictment or information, sec. 94-6414.

Private statutes, how pleaded, sec. 94-6416.

Selling, exhibiting, etc., lewd and obscene books, pleading for, sec. 94-6421.

Bill of Particulars

In a criminal case no bill of particulars may be required or ordered. State v. Boseh, 125 M 566, 242 P 2d 477, 487. (This case expressly overrules any statement or holding to the contrary in State v. Gondeiro, 82 M 530, 268 P 507; State v. Shannon, 95 M 280, 26 P 2d 360; State v. Stevens, 104 M 189, 65 P 2d 612; State v. Hahn, 105 M 270, 72 P 2d 459; State v. Robinson, 109 M 322, 86 P 2d 265, and any other such statements or holdings by this court.)

Common Understanding Rule

The test of the sufficiency of an information is: would a person of common understanding know what is intended to be charged? State v. Board, 135 M 139, 337 P 2d 924.

The test of the sufficiency of an information is whether the defendant is apprised of the charges brought against him and whether he will be surprised. State v. Bogue, 142 M 459, 384 P 2d 749, overruling State v. Hale, 129 M 449, 291 P 2d 229.

Essentials in General

An information stating the proper title of court and cause and containing a statement of the facts constituting the offense, charged in ordinary and concise language so as to enable a person of common understanding to know what was intended, is sufficient. State v. Paine, 61 M 270, 273, 202 P 205.

Operation in General

An information need not necessarily contain a specific allegation that the prosecution is conducted in the name and by authority of the state, as required by the constitution, where it appears from the record that it is so conducted, is in the proper form and is otherwise sufficient. State v. Barry, 45 M 582, 584, 124 P 774.

Sufficiency of Charge

An information not objectionable on the ground that it did not contain a statement of facts constituting the offense in ordinary and concise language, or that it was not direct and certain in its statements. State v. Phillips, 36 M 112, 118, 92 P 299.

Stating facts, charging a crime, in the form of participial clauses, though that is a method of pleading not to be commended, does not render an information abortive. The proper way, however, to make the charge is by direct allegation. State v. Pemberton, 39 M 530, 532, 104 P 556.

An information must charge the crime alleged to have been committed with certainty and precision, setting forth all the affirmative facts which constitute a prima facie case under the statute charged to have been violated. State v. Hem, 69 M 57, 62, 63, 220 P 80.

Sufficiency of Charge-Attempted Rape

Information charging defendant willfully, unlawfully and feloniously attempted to have sexual intercourse with prosecutrix, and forcibly and violently, without her consent and contrary to her wishes and expressed protest, demanded that she submit to sexual intercourse and by force attempted to overcome her and accomplish the act of intercourse, held sufficient against objections that no overt

act was charged and intent insufficiently alleged. State v. Stevens, 104 M 189, 195, 65 P 2d 612, overruled on other grounds in State v. Bosch, 125 M 566, 589, 242 P 2d 477.

Sufficiency of Charge—Attempting To Influence Jurors

A consolidated information which charged the defendant with attempting to influence two named jurors in a named action was sufficient. State v. Bogue, 142 M 459, 384 P 2d 749.

Sufficiency of Charge—Clerical Mistake Not Vital

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. State v. Polich, 70 M 523, 526, 226 P 519.

Sufficiency of Charge-Date of Offense

A conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced. State v. Rogers, 31 M 1, 5, 77 P 293.

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. State v. Rogers, 31 M 1, 4, 77 P 293.

In a prosecution for homicide, where all the evidence showed that, if committed at all, the offense was committed on the day alleged in the information, the court was warranted in charging the jury that it was not necessary that the homicide should have been committed on the precise date laid in the pleading, but it was sufficient if it appeared that it had been committed prior to the filing of the information. State v. Vanella, 40 M 326, 342, 106 P 364.

If a crime is charged as having been committed on one date, while the evidence shows that it was done at another time, but within the statute of limitations, the prosecution does not fail, but there is a variance which may be material enough to justify a continuance. State v. Gaimos, 53 M 118, 124, 162 P 596.

If the information charging rape fixes a definite date, and the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged was committed upon another date, but before the information was filed, the prosecution will not necessarily fail, though defendant may be entitled to a continuance because of the variance. State v. Gaimos, 53 M 118, 123, 162 P 596.

Defendant, convicted of unlawful possession of intoxicating liquor, was not prejudiced by the variance between the allegation in the information that the offense was committed on the tenth of December and the state's proof of its commission on the twelfth of the same month. State v. Sorenson, 65 M 65, 210 P 752.

An allegation in an information charging murder that the offense was committed "on or about" a certain date of a given year, held sufficient, such date being prior to the date of filing, and since time was not an essential ingredient of the offense, and the exact time is not claimed to have been a material ingredient. State v. Heaston, 109 M 303, 307, 97 P 2d 330.

Sufficiency of Charge—False Pretenses

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. State v. Phillips, 36 M 112, 118, 92 P 299.

Sufficiency of Charge-Forgery

An information which, after charging forgery of a promissory note, added that defendant, knowing that the instrument was false, uttered, passed, and published the same as true and genuine, with intent o defraud, etc., was not fatally defective. State v. Mitten, 36 M 376, 381, 92 P 969.

Sufficiency of Charge—Illegal Transportation of Liquor

Neither the time of day, the means of conveyance, the particular brand of liquor transported nor the termini of the route over which it is carried are made constituent elements of the completed offense of illegal transportation, and therefore an information charging that crime is sufficient without allegations to that effect. State v. Dow, 71 M 291, 298, 229 P 402.

Sufficiency of Charge-Larceny

Information charging defendant, president of a brokerage firm, with larceny as bailee of a sum of money, couched substantially in the language of subdivision 2 of section 94-2701, was sufficient and not vulnerable to a general demurrer. State v. Lake, 99 M 128, 136, 43 P 2d 627.

Sufficiency of Charge—Lewd and Lascivious Act on Child

An information under section 94-4106 for committing a lewd and lascivious act on a

child was sufficient although it did not allege the age of the defendant. State v. Davis, 141 M 197, 376 P 2d 727, 729.

Sufficiency of Charge-Liquor Laws

An information charging defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor, which alleged that defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control "for the time being," the words used in the statute under which the prosecution was brought, and was therefore sufficient under former section. State v. Conway, 38 M 42, 43, 98 P 654.

Where the information charged defendant with a sale of "certain spirituous liquid containing more than one-half of one per centum of alcohol by volume which was fit for beverage purposes," but the proof showed the sale of moonshine whisky, a liquor different from that described in the information, there was a variance which, however, was not fatal, it appearing that defendant was as fully prepared to meet the proof made by the state as he would have been to meet that of the charge contained in the information. State v. Sedlacek, 74 M 201, 208, 239 P 1002.

The information in a prosecution charging sale of intoxicating liquor to a minor, need not specify the particular kind of liquor; the allegation that defendant sold "certain intoxicating liquor," etc., was sufficient to advise defendant of the charge against him. State v. Baker, 87 M 295, 298, 286 P 1113.

Sufficiency of Charge-Manslaughter

Information which charged the defendant with manslaughter in the form established in former section and used the words "did then and there willfully, wrongfully, unlawfully, knowingly and feloniously kill one Duane Leslie Egge, a human being of the age of five years, contrary" was sufficient. State v. Duncan, 130 M 562, 305 P 2d 761, 763.

Information for manslaughter was sufficient. State v. Haley, 132 M 366, 318 P 2d 1084, 1085.

Sufficiency of Charge-Murder

An information for murder should directly allege that death resulted from the mortal wounds inflicted by defendant. State v. Keerl, 29 M 508, 511, 75 P 362.

v. Keerl, 29 M 508, 511, 75 P 362.

If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge, and be held

not to have been prejudiced by the use of peculiar phraseology in it. State v. McGowan, 36 M 422, 425, 93 P 552.

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the code. State v. Hayes, 38 M 219, 221, 99 P 434.

An information alleging that at a specified time and place defendant did "willfully, unlawfully, feloniously, premeditatedly, and of his malice aforethought kill and murder" a designated person, is sufficient to charge murder, though it does not set forth facts showing how and by what means the actual killing was accomplished. State v. Hayes, 38 M 219, 221, 99 P 434. See also State v. Nielson, 38 M 451, 454, 455, 100 P 229; State v. Guerin, 51 M 250, 257, 152 P 747.

An information alleging that accused assaulted deceased, violently threw her to the ground, and otherwise assaulted her until she became unconscious, and then permitted her to lie exposed to inclement weather, and neglected to provide her with necessary clothing and protection, by reason of which assault and exposure she died, charged murder, and the state was not bound to elect whether it would proceed on the theory of assault, or exposure, or both. State v. Rees, 40 M 571, 575, 107 P 893.

An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony," after the words "murder in the first degree," hence the insertion of the two words by order of court upon complaint that the copy served upon defendant did not contain them did not render the information subject to a motion to quash. State v. Vuckovich, 61 M 480, 491, 203 P 491.

Where two defendants, tried separately, had entered into a conspiracy to commit robbery by taking incriminating evidence from the possession of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. State v. Bolton, 65 M 74, 80, 212 P 504.

Sufficiency of Charge-Name of County

Where, in an information for murder, the only mention of the county in which the crime was committed appeared in the caption describing the court in which, and the officer by whom, the charge was preferred, while in the charging part of the document the word "county" was not used at all, and the only reference words found there were in the expression "then and there," the first of which referred to a

preceding date alleged as the date of the crime, while the latter indicated some place, not described, where the defendant then was, it was held that, in the absence of an expression such as "in the county aforesaid" or "said county," thus referring to the caption, the information did not allege the county in which the offense had been committed, and was fatally defective. State v. Beeskove, 34 M 41, 50, 85 P 376.

The charge in the information that the seditious language alleged to have been used by defendant was uttered in M. county was a sufficient allegation of the place. State v. Fowler, 59 M 346, 352, 196 P 992.

An information which charged that defendant at the county of M., state of Montana, "then and there being, then and there did willfully, etc., possess" certain liquor, etc., was not open to the objection that it failed to allege that the act was committed in M. county, "then" referring to the time and "there" to that county. State v. Polich, 70 M 523, 526, 226 P 519.

Sufficiency of Charge-Name of Parties

An information against one George Howard, alias James Howard, alias Joe Kirby was sufficient, the information having charged his prior conviction, and the different names being for purpose of identifying him as the person previously convicted. State v. Howard, 30 M 518, 520, 77 P 50.

Sufficiency of Charge-Name of Victim

Where a defendant was convicted of crime upon an information stating the name of the injured person as "Frank Rex," whereas his own testimony showed that it was "Frank Rock," and there was not any showing that he was named or had been known as Frank Rex, it was held that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "Frank Rex" and "Frank Rock" were one and the same person, the variance was fatal to conviction. State v. Lee, 33 M 203, 205, 83 P 223.

Sufficiency of Charge-Officer Signing

A deputy county attorney may present an information in his own name; hence the fact that an information was signed by him instead of by the county attorney did not render it invalid; at most his act, while perhaps improper from an ethical standpoint, was no more than an irregularity which could not affect appellant's substantial rights and was therefore insufficient to warrant reversal. State v. Larson, 75 M 274, 276, 243 P 566.

Sufficiency of Charge-Perjury

If an information for perjury sets forth the substance of the matter in respect to

which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. State v. Jackson, 88 M 420, 428, 293 P 309.

Sufficiency of Charge-Person Injured

While a mistake in the name of the person injured is not to be deemed material, if the injury is so described in other respects as to identify it, yet if it is not so identified by the evidence as that it can be said to be the same, there is such a variance as amounts to a failure of proof, and the conviction cannot be sustained. State v. Moxley, 41 M 402, 409, 110 P 83.

Sufficiency of Charge-Robbery

It is sufficient in an information for robbery, to charge that the taking was accomplished "with" force and fear, instead of "by means of force and fear." The word "with," in this connection, is equivalent to the expression "by means of." State v. Pemberton, 39 M 530, 532, 104 P 556.

An information for robbery is sufficient, with respect to the crime, if it enables a person of ordinary understanding to know what is intended to be charged. State v. Pemberton, 39 M 530, 532, 104 P 556

Sufficiency of Charge-Sedition

An information charging sedition, in that defendant knowingly, unlawfully, etc., uttered and published disloyal, profane, violent, scurrilous, contemptuous, and abusive language concerning the soldiers and the uniform of the United States army, was defective for failure to set out the specific words characterizing his remarks as disloyal, contemptuous, etc. State v. Wolf, 56 M 493, 499, 185 P 556.

An information charging a violation of the sedition act is sufficient in stating that the defendant had said that the American soldiers "would act in the same way and commit the same atrocities as have been reported of the German soldiers," without setting out the atrocities reported to have been committed by the German soldiers. State v. Wyman, 56 M 600, 607, 186 P 1.

An information in charging the crime of sedition is fatally defective on the ground of uncertainty where it is alleged that the offense consists of the statement that "she wished the people would revolt and that she would shoulder a gun and get the president the first one," for the reason that a presumption must be indulged in to determine whether the defendant meant the

people or the president of the United States or the people or president of some other country. State v. Smith, 58 M 567,

572, 194 P 131.

An information charging one with seditious utterances should set forth the fact whether the words were uttered in private conversation with a single person or from a public platform, or were disseminated through the medium of printed articles. State v. McGlynn, 60 M 416, 420, 199 P 708.

Sufficiency of Charge—Theft

Under provision that an information charging a criminal offense must contain a statement of the facts constituting the crime in ordinary and concise language so as to enable a person of common understanding to know what is intended, held, that an information charging defendant with stealing "five Ford wire wheels and tires" was sufficient to advise him that five wire wheels and tires for a Ford automobile were the articles charged to have been stolen, and therefore sufficient to enable him to prepare for his defense. State v. Dimond, 82 M 110, 112, 265 P 5.

Sufficiency of Charge-Time of Offense

An indictment for rape, which charges the commission of the offense "on or about" a certain day, sufficiently states the time. State v. Thompson, 10 M 549, 557,

Sufficiency of Charge-Unlawful Sale of Drug

Information charging unlawful sale of morphine hydrochloride held sufficient. State v. Brennan, 89 M 479, 487, 300 P

Superfluous Words or Sentences Held **Immaterial**

Superfluous words or sentences inserted in an information charging crime may be treated as surplusage and disregarded, if, without such words and sentences, it sufficiently charges the offense alleged to have been committed. State v. McGowan, 36 M 422, 427, 93 P 552.

Technical Error

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895 was abrogated by sections declaring that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. State v. Gordon, 35 M 458, 466, 90 P 173.

Where, under the evidence submitted at a trial for assault in the second degree, the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. State v. Tracey, 35 M 552, 555, 90 P 791.

A judgment of conviction will not be reversed for error in the trial proceedings, unless it has prejudiced, or tended to prejudice, the defendant in respect to a substantial right. State v. Rhys, 40 M 131, 134, 105 P 494.

When It Is Proper To Allow Endorsement After Filing

Where defendant's attorney knew of a witness against defendant, but failed to discover the nature and extent of his potential testimony, assuming he would not be discovered, it was not reversible error to permit the witness' name to be endorsed on the information the day of the trial, nor to permit the witness to testify, since the elements of surprise and unfair advantage were lacking under the circumstances. State v. Cooper, 146 M 336, 406 P 2d 691.

When Refusal of Continuance not Prejudicial

Where defendant, charged with committing lewd and lascivious acts upon a female child of the age of nine years, had been notified by the county attorney after plea and the day before the trial that he intended to prove that the offense was committed about a week later than charged in the information and the court denied his motion for continuance, such refusal was not prejudicial error since time is not a material ingredient of the offense. State v. Kocher, 112 M 511, 518, 119 P 2d 35.

When Variance Not Reversible Error

While defendant was furnished a bill of particulars showing that while the information charged the violation of the liquor law on a certain date, the state would rely on proof of a sale made on a dif-ferent date and during the trial the court inquired of him whether he had been taken by surprise, and he declined to state that he was surprised and did not ask for a continuance, he was in no position to claim prejudice by the introduction of proof relating to a sale made on the latter date, he not having been injured by the variance, if any. State v. Knilans, 69 M 8, 13, 220 P 91.

Where Offense Incorrectly Named, Not Fatal to Pleading

The general rule is that when the facts, acts and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

Collateral References

Indictment and Information \$\infty\$=46, 54, 74.

42 C.J.S. Indictments and Informations §§ 35 et seq., 66 et seq., 87 et seq.

41 Am. Jur. 2d 905 et seq., Indictments and Informations, § 44 et seq.

Amendment as to date of offense, court's power as to. 7 ALR 1531 and 68 ALR

Perjury, date of proceeding in which committed. 24 ALR 1143.

Prior conviction, necessity and sufficiency of allegations as to, under statute enhancing penalty for subsequent conviction. 58 ALR 64; 82 ALR 366; 116 ALR 229; 132 ALR 107 and 139 ALR 689.

Statutes regarding form of indictment as violation of constitutional requirement

of "indictment." 69 ALR 1392.

Substitution by mistake of name of person other than defendant for defendant's name. 79 ALR 219.

Materiality of false statement, sufficiency of general averment as to. 80 ALR

Bank officer's offense of making false statement or report as to assets or condition of bank, indictment for. 85 ALR 834. Blue sky laws, indictment for violation.

87 ALR 151.

Incorporation or legal entity of owner of property not a natural person, necessity alleging. 88 ALR 485.

Limitation period, necessity of alleging facts relied upon to avoid effect of lapse

of. 99 ALR 153.

Automobile, indictment for assault in

connection with, 99 ALR 837, Automobile or automobile equipment or accessories, sufficiency of description of, in indictment for larceny. 100 ALR 791.

Value of property intended to be stolen, which could make its theft a felony, necessity and sufficiency of allegations as to, in indictment for burglary. 113 ALR

Automobile, sufficiency of charging in words of statute offense, relating to operation of. 115 ALR 357.

Necessity of alleging specific facts or means in charging one as accessory before or after the fact. 116 ALR 1104.

Uniform Narcotic Drug Act, indictment for violation. 119 ALR 1399.

Error in naming offense covered by allegations of specific facts. 121 ALR 1088.

Aggravation, necessity of charging matter of, to justify imposition of higher punishment under a statute which varies punishment according to enormity of offense. 125 ALR 605.

Real property or thing savoring of real property, indictment for larceny of. 131 ALR 146.

Time and manner of raising objections of misnomer of defendant in indictment or information. 132 ALR 410.

Failure to make proof of loss of indictment and to enter order of substitution of certified copy until after defendant had

been arraigned. 133 ALR 1337.

Barratry, indictment or information in prosecution for, 139 ALR 625.

False pretense, sufficiency of indictment or information in prosecution for, charging that defendant obtained money, and also that he received and cashed a draft, note, etc. 141 ALR 220.

Burden of averment as to exception in criminal statute on which prosecution is

based, 153 ALR 1218,

Necessity of alleging in indictment or information that act was "unlawful." 169

Averment of extrinsic facts showing legal efficacy of instrument invalid on its face, necessity of. 174 ALR 1329.

Sufficiency of indictment or information for forgery based on use of fictitious or assumed name. 49 ALR 2d 886.

Indictment for bribery in athletic con-

test. 49 ALR 2d 1237.

Indictment under statute making solicitation to commit crime a substantive offense. 51 ALR 2d 959.

Indictment in prosecution for false pretense based on false statement as to existing encumbrance on chattel made to obtain loan or credit. 53 ALR 2d 1220.

Homicide, necessity and materiality of statement of place of death in indictment or affidavit charging. 59 ALR 2d 901.

Time, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1297.

Place, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1335.

Name, status, or description of persons or organizations, power of court to make or permit amendment of indictment with respect to allegations as to. 14 ALR 3d 1358.

Middle name or initial of person named therein, sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating. 15 ALR 3d 968.

Property, objects, or instruments, other than money, power of court to make or permit amendment of indictment with respect to allegations as to. 15 ALR 3d

Money, power of court to make or permit amendment of indictment with respect to allegations as to. 16 ALR 3d 1076.

Criminal intent or scienter, power of court to make or permit amendment of indictment with respect to allegations as to. 16 ALR 3d 1093.

Prior convictions, power of court to make or permit amendment of indictment with respect to allegations as to. 17 ALR 3d 1265.

Circumstances, power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening or. 17 ALR 3d 1285.

DECISIONS UNDER FORMER LAW

Bill of Particulars

Where one charged with crime deems the information too indefinite or uncertain he has the privilege of demanding a bill of particulars to supply the deficiency. Modern tendency of criminal procedure has been toward simplification. State v. Summers, 107 M 34, 35, 79 P 2d 560.

Where an inquest had been held a year

Where an inquest had been held a year prior to trial in a prosecution for manslaughter for the killing of a pedestrian by reckless driving, the court could presume that the coroner had complied with the law as to the transcript of the testimony, which was available for defendant's inspection for the desired information, held, denial of defendant's motion for a bill of particulars not an abuse of the court's discretion. State v. Robinson, 109 M 322, 327, 96 P 2d 265.

As against the contention that a bill of particulars may not be resorted to for the purpose of perfecting a defective information, held, that such is the rule, but the bill may be resorted to for the purpose of clarifying the general terms of the information. A bill of particulars performs a function for the information similar to that of a definition for a word; it is designed for use where the information is sufficient, on demurrer, and, in the sound discretion of the court and in furtherance of justice, to give accused fair notice of what he is called on to defend, a bill of particulars may, on motion of accused, be required. State v. Wong Sun, 114 M 185, 192, 133 P 2d 761.

Declaratory of the Common Law

Former section stating what indictment or information must contain was but a paraphrase of the common-law rules covering the requisites of criminal pleading. State v. Wolf, 56 M 493, 496, 185 P 556.

Endorsement of Witnesses' Names

Where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be endorsed on the day before trial. State v. Calder, 23 M 504, 506, 59 P 903. See also State v. Biggs, 45 M 400, 403, 123 P 410.

The act of the county attorney in endorsing, under the directions of the court, the names of other witnesses on the information is not error, as such witnesses were

subject to be examined whether their names were endorsed on the information or not. State v. Schnepel, 23 M 523, 524, 59 P 927. See also State v. Newman, 34 M 434, 437, 87 P 462; State v. Biggs, 45 M 400, 403, 123 P 410.

It is error to deny the county attorney the right to examine witnesses because their names do not appear on the information, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed. State v. Schnepel, 23 M 523, 525, 59 P 927.

A witness in a criminal prosecution may not be prevented from testifying because his name was not endorsed on the information, where it does not appear from the record that the county attorney knew of the witness at the time he filed the information. State v. Newman, 34 M 434, 437, 87 P 462. See also State v. Biggs, 45 M 400, 403, 123 P 410.

Omission by the county attorney to endorse the names of material witnesses for the state upon an information, as required by former statute, either because not known to him at the inception of the prosecution, or through negligence or ignorance, is not sufficient reason to make their testimony inadmissible. State v. McDonald, 51 M 1, 4, 149 P 279.

Where a county attorney violated the express statutory injunction by endorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. State v. McDonald, 51 M 1, 7, 149 P 279.

Even though a county attorney knew of witnesses whose names he did not endorse upon the information at the time of its filing, it was still within the discretion of the trial court to allow them to be examined. State v. McDonald, 51 M 1, 4, 149 P 279.

Provision requiring endorsement of witness' names on information was intended as a safeguard to the accused against surprise and unfair advantage by the prosecuting officer, and to serve the same purpose as a like provision relating to the disclosure of the names of witnesses upon whose testimony an indictment is found

and returned by a grand jury. State v. McDonald, 51 M 1, 5, 149 P 279.

The purpose of former section requiring endorsement of witnesses' names on information was to advise the defendant, so far as reasonably possible, of the witnesses known to the county attorney when the information was filed, whom the state intended to call against him, in order that he might have the opportunity to make inquiry with respect to them and prepare himself to meet their testimony. State v. McDonald, 51 M 1, 4, 149 P 279. See also State v. Gaimos, 53 M 118, 121, 162 P 596.

While section, requiring the county attorney to endorse the names of all witnesses known to him upon an information at the time of its filing, did not require the names of subsequently discovered witnesses to be so endorsed, he should, under former law, have done so, to avoid complaint that the accused did not have sufficient opportunity to meet the testimony of witnesses of whom he had no knowledge; concealment of names of material witnesses might, on a proper showing, have constituted prejudice. State v. Harkins, 85 M 585, 281 P 551.

Where a county attorney at the time of filing an information did not know that a certain person would be a witness and therefore did not endorse his name thereon, his application to permit him to make the endorsement at the beginning of the trial, held to have been properly granted. State v. Harkins, 85 M 585, 281 P 551; State v. Gaffney, 106 M 310, 313, 77 P 2d 398.

Former statute requiring county attorney to endorse names of state's witnesses on an information at the time it was filed, if they were known, did not prevent state from using witnesses whose names were not so endorsed. Held, in the instant case, that defendant could not have been prejudiced because of previous showing, and situation was not one wherein there had been a concealment of incriminating evidence, but designed for rebuttal and corroboration. State v. Akers, 106 M 43, 54, 74 P 2d 1138.

Reason for former statutory requirement that names of witnesses be endorsed on the information was to safeguard defendant against surprise and unfair advantage. There was no unfair advantage taken of defendant when the county attorney endorsed the name of a witness after impaneling a jury because he did not know of the existence of the witness at the time when the information was filed and gave notice to the defendant's attorney at that time and offered to agree to a reasonable delay in the trial in order that the defendant could examine the witness and secure evidence to meet his testi-

mony. State v. Phillips, 127 M 381, 264 P 2d 1009, 1015.

Purpose of former section requiring endorsement of witnesses' names on information at time of filing was to protect accused from surprise and unfair advantage and to afford him a fair opportunity to defend himself adequately. State v. Cooper, 146 M 336, 406 P 2d 691.

Under former statute requiring endorsement of witnesses' names on information at time of filing, it was not reversible error to permit endorsement on day of trial and to allow the witness to testify where defense attorney knew of the witness but failed to discover the nature and extent of his potential testimony; under the circumstances the elements of surprise and unfair advantage were lacking. State v. Cooper, 146 M 336, 406 P 2d 691.

Endorsement of Witnesses' Names—Defendant's Wife

Where the name of defendant's wife was endorsed on the information among the names of the witnesses for the state, over his objection that she was incompetent, but on the trial she was excluded from testifying, on a renewal of the objection, defendant was not prejudiced by being compelled to object to her competency before the jury. State v. Sloan, 22 M 293, 297, 56 P 364. See also State v. Biggs, 45 M 400, 403, 123 P 410.

Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant was formerly by way of a request for a bill of particulars. State v. Hahn, 105 M 270, 273, 72 P 2d 459.

Larceny

Former provision that indictment or information was sufficient if it could be understood therefrom that offense was committed or triable within court's jurisdiction had no application to an information charging larceny. State v. De Wolfe, 29 M 415, 422, 74 P 1084, overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Purpose

Former sections governing forms and rules of pleading and sufficiency and form of indictments and informations were intended to relax the technical rules which prevailed at the common law, and to simplify the procedure to the end that regard to substance rather than form should be the rule of interpretation. State v. Brown, 38 M 309, 312, 99 P 954.

Sufficiency of Charge

An information charging illegal transportation of intoxicating liquor in the

language of the statute, that defendant "at the county of M. did willfully, wrongfully and unlawfully transport certain intoxicating liquors," etc., was sufficient as against the contention that it was fatally defective for failure to charge that the offense was committed within the jurisdiction of the court; if deemed insufficient it was the duty of defendant to apply for a bill of particulars in advance of the trial. State v. Redmond, 73 M 376, 378, 237 P 486.

Sufficiency of Charge—Secreting Public Record

Where an indictment for secreting a public record alleged that defendant, being an officer and having in his custody a certain public record, and which said record came into and was in his hands, and was by him feloniously secreted, and defendant contended that the charging part was an unfinished sentence, and that the allegation respecting secretion was merely descriptive of the record, the offense was charged with "such a degree of certainty" that judgment might be pronounced according to the right of the case, under former section governing sufficiency. State v. Bloor, 20 M 574, 582, 52 P 611.

Sufficiency of Charge—Time of Offense Under the Prohibition Act it was a public offense to possess liquor unlawfully at

any time, hence time was not an ingredient of the offense within the meaning of former section, providing that the precise time at which it was committed need not be stated in the information, it being sufficient if it is alleged that its commission occurred at any time before filing thereof, except where the time is a material ingredient in the offense. State v. Terry, 77 M 297, 299, 250 P 612.

Technical Error

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer," while improper, held technical error under former statute, and nonprejudicial when considered in connection with the particular circumstances. State v. Cassill, 71 M 274, 283, 229 P 716.

When Bill of Particulars Available

Where defendant charged with crime deems the information too indefinite and uncertain he has the privilege of applying for a bill of particulars, and where it is apparent that by reason of the too general character of the charge defendant may have difficulty in preparing his defense, the trial court should incline toward granting the motion for such a bill. State v. Stevens, 104 M 189, 198, 65 P 2d 612.

95-1504. Joinder of offenses and of defendants. (a) An indictment, information, complaint or accusation may charge two (2) or more different offenses connected together in their commission, or different statements of the same offense or two (2) or more different offenses of the same class of crimes or offenses, under separate counts, and if two (2) or more indictments, informations, complaints or accusations are filed in such cases in the same court, the court may order them to be consolidated. Allegations made in one count may be incorporated by reference in another count. The prosecution is not required to elect between the different offenses or counts set forth in the indictment, information, complaint or accusation, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which the case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the indictment, information, complaint and accusation be tried separately or divided into two (2) or more groups and each of said groups tried separately. An acquittal of one (1) or more counts shall not be deemed an acquittal of any other count.

(b) Two (2) or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one (1) or more counts together or separately and all of the defendants need not be charged in each count.

(c) If it appears that a defendant or the state is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require.

History: En. 95-1504 by Sec. 1, Ch. 196, L. 1967.

Source: Federal Rules of Criminal Procedure, Rules 7(c) and 8; Revised Codes of Montana 1947, section 94-6407.1; Illinois Code of Criminal Procedure, Chapter 38, section 111-4.

Cross-References

Discharging defendant that he may be a witness for the state or for his co-defendant, effect of such discharge, secs. 94-7206 to 94-7208.

Former Jeopardy

Where the defendant was charged with twenty-two counts of statutory rape and convicted on nine of the counts, it was proper that each charge be set forth in a separate count in the information and there was no violation of state or federal constitutional guaranty against double jeopardy. State v. Boe, 143 M 141, 388 P 2d 372.

Information in five counts, three of which alleged larceny of more than one cow, did not violate "former jeopardy" provision of constitution in that each count states a separate offense and in view of grand larceny statute which makes the theft of each separate animal a separate and distinct offense and in view of statute providing for joinder of offenses which permits an information to charge more than one offense in separate counts. State v. Johnson, 149 M 173, 424 P 2d 728.

Waived by Failure To Demur

Any objection to the inclusion in one count of the statement of different forms of the same offense must be made in the district court, and before plea. The objection that the information charges two offenses is waived by a failure to demur. State v. Mahoney, 24 M 281, 285, 61 P

Collateral References

Acquittal of principal or conviction of lower degree of offense as affecting prosecution of aider or abettor. 24 ALR 603.

Right to severance where two or more persons are jointly accused. 70 ALR 1171; 104 ALR 1519 and 131 ALR 917.

Separate trial of persons jointly charged as habitual criminals under statute enhancing penalty for second or subsequent offense, 116 ALR 241; 132 ALR 91 and 139 ALR 673.

Right to severance where codefendant has incriminated himself, 54 ALR 2d 830.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 ALR 3d 866.

DECISIONS UNDER FORMER LAW

What Constitutes Two Offenses

An information charging forgery in two counts, the first by the false making of the instrument, and the second by uttering it, is not vulnerable to attack by demurrer for charging two offenses, the inhibition of former section that the indictment or information must charge but one offense, being directed to pleadings which charge more than one distinct offense and not to one which in each of two counts charges the same offense. State v. Mitton, 37 M 366, 370, 96 P 926. See First Nat. Bank of Miles City v. Barrett, 52 M 359, 365, 157 P 951.

Former provision permitted only one offense to be charged in information, and conviction could be had for that offense only; different acts of the same sort might be proved for purpose of corroboration. State v. Gaimos, 53 M 118, 124, 162 P 596.

An information against a defendant for knowingly and without consideration taking or receiving from a prostitute any of her earnings, and also with living upon the earnings of a prostitute, charged two distinct offenses in violation of former statute. State v. Kanakaris, 54 M 180, 182, 169 P 42.

95-1505. Amending the charge. (a) A charge may be amended in matters of substance at any time before the defendant pleads, without leave of court.

- (b) The court may permit any charge to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.
- (c) No charge shall be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant.

History: En. 95-1505 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-6207, 94-6413 and 94-6430.

Amendment of Information

Under former section, an information could be amended in matter of substance or form at any time before the defendant pleaded, without leave of court, but after plea it could be amended as to form only when it could be done without prejudice to the rights of defendant, and as to substance not at all. State v. Fisher, 79 M 46, 49, 254 P 872.

Under former statute held, that where defendant was charged by information with a misdemeanor (liquor violation) and some four months after plea of not guilty the county attorney was permitted, over objection, to amend the information by adding a charge of prior conviction thereby changing the grade of the offense from a misdemeanor to a felony—a matter of substance—the action of the court in allowing the amendment constituted error, the fact that defendant after amendment was rearraigned and pleaded over not changing the rule. State v. Fisher, 79 M 46, 49, 254 P 872.

When the new trial was granted after defendant was convicted and served about a month in the state prison in a prosecution for the larceny of one of four colts, held that, the information could have been amended by leave of court to charge the same offense, without violating any right of defendant and without the right of defendant to plead former jeopardy. State v. Aus, 105 M 82, 87, 69 P 26 584.

Where court allowed state to amend information charging defendant with incest by changing "fornication" to "adultery" there was no substantial change in the charge and only touched a matter of form. Whether the defendant was married or unmarried at the time is not a material ingredient of the offense. In either event the defendant is guilty, if the intercourse charged is proved. State v. Kuntz, 130 M 126, 295 P 2d 707, 710.

The filing of second information, alleging same facts as contained in first information, was in fact an amendment in a matter of substance of the first information in violation of defendant's rights under statute proscribing amendments in a matter of substance, which defendant, represented by competent counsel, waived

for failure to raise timely objection and which defect could have been rectified in the first instance if the prosecuting attorney had availed himself of the statute providing for the dismissal of information by having the first information dismissed and then filing a second information. Gransberry v. State, 149 M 158, 423 P 2d 853.

Amendment of Information—Name of Victim

An information for the crime of robbery may be amended at the close of the testimony for the state, so as to change the name of the person from whom it is alleged the property was feloniously taken. State v. Oliver, 20 M 318, 321, 50 P 1018.

Apex Juris Not Sufficient To Reverse

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. State v. Connors, 27 M 227, 229, 70 P 715.

Clerical Error

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. State v. Polich, 70 M 523, 526, 226 P 519.

Form

The statute authorizes an information to be amended as to form; thus, an information charging "the malicious destruction of property" may properly be amended by substituting the word "burning" for the word "destruction." State v. Sieff, 54 M 165, 168, 168 P 524.

Prior Conviction Charged

Where the state on the day of trial filed an amended information changing the charge from robbery to robbery and a prior conviction of forgery, and the defendant was given no opportunity to either admit or deny the previous conviction, such amendment was substantive, increased

the minimum penalty, and was reversible error. State v. Knight, 143 M 27, 387 P 2d 22.

Sufficiency of Charge

The fact that an amendment was in fact made does not affect the sufficiency of the information, if the same was sufficient before the addition was made. State v. Davis, 141 M 197, 376 P 2d 727, 729.

Sufficiency of Charge-Misspelling

An information alleging that defendant feloniously, willfully, and of his "deliberatedly" premeditated malice aforethought committed the homicide in question, was not fatally defective because of the mere misspelling of the word "deliberately." State v. Lu Sing, 34 M 31, 35, 85 P 521.

Technical Error

A technical error in pleading a prior conviction in another state will not work a reversal if the punishment imposed does not exceed the proper limit. State v. Paisley, 36 M 237, 248, 92 P 566.

Time and Place Are Essential

While in this state much of the par-

ticularity required at the common law has been dispensed with, and no defect or imperfection in form, which does not prejudice the substantial rights of the defendant, can affect a judgment of conviction, still time and place are essential elements, and must be so alleged as to enable a person of common understanding to know what is intended by the charge. State v. Beeskove, 34 M 41, 50, 85 P 376.

Waiver of Objection

Where, after plea of not guilty, county attorney asked permission to amend information and counsel for defendant stated there was no objection, any objection to the amendment of the information to include a prior conviction was waived. State ex rel. Treat v. District Court, 122 M 249, 200 P 2d 248.

Collateral References

Indictment and Information € 160, 161 (8).

42 C.J.S. Indictments and Informations 228 et seq.

41 Am. Jur. 2d 987 et seq., Indictments and Informations, § 171 et seq.

DECISIONS UNDER FORMER LAW

Amendment of Information

Former statute permitting amendment of indictment or information on trial where variance as to time, place, person or thing appeared was constitutional and conferred power on court to grant permission to the county attorney in a prosecution under the liquor law to amend the information at the close of the state's case by changing the date on which the offense was charged to have been committed. State v. Terry, 77 M 297, 298, 250 P 612.

Sufficiency of Charge

Under former section making all forms of pleading and rules by which sufficiency of pleadings is to be determined those prescribed by code, an information was sufficient where it conformed substantially to statutory form and rules and where there was no imperfection in matter or form thereof tending to the prejudice of a substantial right of the defendant on its merits. State v. Stickney, 29 M 523, 528, 75 P 201.

- 95-1506. Prior conviction. When the state seeks increased punishment of the accused as a prior convicted felon under section 94-4713, notice of that fact must be given in writing to the accused or his attorney before the entry of a plea of guilty by the accused, or before the case is called for trial upon a plea of not guilty. Such notice must conform to the following provisions:
- (a) The notice must specify the prior convictions alleged to have been incurred by the accused.
- (b) The notice and the charges of prior convictions contained therein shall not be made public nor in any manner be made known to the jury before the jury's verdict is returned upon the felony charge provided that if the defendant shall testify in his own behalf he shall nevertheless be subject to impeachment as provided in section 93-1901-11, R. C. M. 1947, as amended.
- (c) If the accused is convicted upon the felony charge, the notice, together with proper proof of timely service, shall be filed with the court

before the time fixed for sentence. The court shall then fix a time for hearing with at least three (3) days' notice to the accused.

(d) The hearing shall be held before the court alone. If the court finds any of the allegations of prior conviction true, the accused shall be sentenced under the provisions of section 94-4713.

History: En. 95-1506 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Cross-References

Second offense, how punished after conviction of former offense, sec. 94-4713.

Amended Information

Where the state on the day of trial filed an amended information changing the charge from robbery, to robbery and a prior conviction of forgery, and the defendant was given no opportunity to either admit or deny the previous conviction, such amendment was substantive, increased the minimum penalty, and was reversible error. State v. Knight, 143 M 27, 387 P 2d 22.

Filing of New Charge

Dismissal of original information and filing of new information alleging, for the first time, a prior conviction was not error even though objected to at trial. State v. Gray, — M —, 448 P 2d 744.

Not Retroactive

The statute precluding disclosure to the jury, in a criminal proceeding, of any prior convictions does not apply retroactively to a criminal trial prior to the effective date of the statute. State v. Gray, — M —, 447 P 2d 475.

DECISIONS UNDER FORMER LAW

Plea of Guilty

Former statute providing that jury should determine whether accused has been previously convicted contemplated that the answer to charge or allegation of prior conviction should be an admission or denial, but a plea of guilty was an admission of the charge. State ex rel. Treat v. District Court, 122 M 249, 200 P 2d 248, 249.

Plea of Not Guilty

Contention of petitioner for writ of habeas corpus that his confinement was illegal because information was amended

before trial to charge a previous conviction of a felony and that while he entered a plea of not guilty to such charge of previous conviction the jury made no reference to it in their verdict, as required by statute, was completely false, where the verdict stated that the jury found defendant guilty of lewd and lascivious act upon a child, as alleged in the information, and found the charge of previous lewd and lascivious acts upon a child as alleged in the information true and left the fixing of his punishment to the court. In re Davis' Petition, 139 M 622, 365 P 2d 948, 949.

CHAPTER 16

ARRAIGNMENT OF DEFENDANT

Section 95-1601. Arraignment defined.

95-1602. Place of arraignment. 95-1603. Presence of defendant.

95-1604. Bringing defendant into court.

95-1605. Joint defendants.

95-1606. Procedure on arraignment. 95-1607. Time allowed to answer.

95-1608. Irregularity of arraignment.

95-1601. Arraignment defined. Arraignment is the formal act of calling the defendant into open court to answer the charge against him.

History: En. 95-1601 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Criminal Law 261 (1).

22 C.J.S. Criminal Law § 406 et seq. 21 Am. Jur. 2d 453 et seq., Criminal Law, § 452 et seq. 95-1602. Place of arraignment. The defendant shall be arraigned in the court in which the indictment, information or complaint is filed, unless before arraignment the cause has been removed to another court, in which case he shall be arraigned in that court.

History: En. 95-1602 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, L. 1967.

95-1603. Presence of defendant. If the offense charged is a felony, the defendant must be personally present for arraignment; but if a misdemeanor, he may appear by counsel.

History: En. 95-1603 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6502.

Collateral References
Criminal Law 264.

22 C.J.S. Criminal Law §§ 411, 415.

95-1604. Bringing defendant into court. The court may direct any official who has custody of the defendant to bring him before the court to be arraigned.

History: En. 95-1604 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 94-6503.

95-1605. Joint defendants. Defendants who are jointly charged may be arraigned separately or together, in the discretion of the court.

History: En. 95-1605 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 113-2.

95-1606. Procedure on arraignment. The arraignment in any court in this state must be conducted in the following manner:

- (a) The arraignment must be in open court.
- (b) The court must inquire of the defendant or his counsel the defendant's true name and if the defendant's true name be given as any other than that used in the charge, the court must order the defendant's name to be substituted for the name under which he is charged, and the subsequent proceedings must be conducted with the defendant charged under that name, but in the discretion of the court the defendant may also be referred to by the name by which he was first charged.
- (c) The court must determine whether the defendant is under any disability which would prevent the court in its discretion from proceeding with the arraignment. The arraignment may be continued until such time as the court determines the defendant is able to proceed.
 - (d) The defendant shall be advised by the court as follows:
 - (1) Of the nature of the crime charged against him;
 - (2) Of the punishment as set forth by statute for the crime charged;
- (3) If the defendant appears for arraignment without counsel the court shall advise him of his right to counsel and of his right to assigned counsel if he is unable to employ counsel. If counsel is or has been waived by the defendant the court shall ascertain if the waiver is or was voluntary before proceeding;
 - (4) Of the time prescribed by statute to enter a plea;
 - (5) Of his right to secure bail to release him from custody.

(e) The court, or the clerk or county attorney under its direction must deliver to the defendant a true copy of the indictment, information or complaint, including the endorsements thereon and the list of witnesses, when required, and read the indictment, information or complaint to the defendant, unless the defendant or his counsel waives such reading, and ask him whether he pleads guilty or not guilty to the indictment, information or complaint.

The defendant shall enter a plea of guilty or not guilty to the indictment, information or complaint. If the defendant refuses to plead to the indictment, information or complaint a plea of not guilty must be entered.

The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge.

The court must prepare and keep a written record of all arraignment proceedings. In district courts a verbatim record of all arraignment proceedings must be made, preserved and filed with the court.

History: En. 95-1606 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, Chapter 65, Title 94.

Conditional Pleas Not Authorized

Held, under former statutes, that since the codes make no provision permitting one charged with a criminal offense to enter a conditional plea to the effect that he pleads guilty provided the punishment imposed be not greater than that designated, the court has no authority to receive such a plea and its entry is a nullity. State v. Dow, 71 M 291, 299, 229 P 402.

Copy of Information

Where defendant raised objection that copy of information furnished him was materially different from the information on which he was about to be tried, which on which he was about to be tried, which objection court sustained, and required defendant to be furnished with a true copy, as required by former statute, a refusal of the request constituted reversible error under this section, the record showing that no plea was entered at the trial; former provision requiring that accused, on arraignment, be given a copy of the information meant a true copy. State v. De Wolfe, 29 M 415, 74 P 1084, over-ruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Defendant's Refusal To Plead

Where the record discloses that the defendant refused to plead to any charge contained in the indictment, statute is sufficiently complied with by the action of the court in ordering a plea of "not guilty to all charges contained in the indictment." State v. Clancy, 20 M 498, 502, 52 P 267. Where time for entering plea arrived,

requiring defendant to plead to informa-

tion, even though in absence of counsel, was not error and where defendant stood mute, court properly entered a plea of not guilty for him. State v. Stevens, 119 M 169, 172 P 2d 299, 301.

Endorsements on Information

It would appear from former section that the endorsements on the information are not considered part of the information. State v. De Lea, 36 M 531, 533, 93 P 814.

Mandatory Duties on Arraignment

The provisions of predecessor section were mandatory, and it was the duty of the district court to inform the defendant that he had a right to counsel, that if he was without means to employ counsel that counsel would be provided for him by the state without cost and to inform him of the extent of the penalty provided by law; the record was required to show that statutory provisions as to period of time between plea and sentence were complied with. State ex. rel. Biebinger v. Ellsworth, 147 M 512, 415 P 2d 728.

Former provision authorizing four kinds of pleas to an indictment or information were not applicable in an action for death by wrongful act where a violation of the statute requiring the use of safety-cages in mines was charged. Maronen v. Anaconda Copper Min. Co., 48 M 249, 261, 136

Defendant was charged with liquor violations in four counts; he entered a plea of not guilty "to the offense charged." Two counts were dismissed and he was found guilty on the remaining two. Held, as against the contention that the conviction cannot be sustained because defendant never pleaded to the charges contained

in the two counts on which conviction was had but had pleaded only to one offense, not ascertained, that his plea to the information as a whole was authorized, and therefore sufficient. State v. Grasswick, 77 M 326, 328, 250 P 613.

When Motion To Change Plea to Not Guilty Properly Denied

Quaere: Is there a plea of "not guilty by reason of insanity"? Where defendant pleaded guilty on two charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, held, under the facts and circumstances presented, that the motions were properly denied. State v. Hukoveh, 115 M 125, 131, 139 P 2d 538.

Collateral References

Criminal Law@=267, 272, 299.

22 C.J.S. Criminal Law § 406 et seq. 21 Am. Jur. 2d 453-456, Criminal Law,

§§ 452-457.

Withdrawal of plea of nolo contendere, non vult contendere, or guilty. 6 ALR 696 and 152 ALR 271.

Guilty plea, right to withdraw. 20 ALR 1445 and 66 ALR 628.

Prior conviction, effect of plea of guilty to indictment charging, under statute enhancing penalty for second offense. 58

ALR 78; 82 ALR 369; 116 ALR 231 and 139 ALR 693.

Lesser degree of crime, duty of court to accept tendered plea of guilt of, where prosecuting officer has agreed to recommend acceptance of such plea if defendant will turn state's evidence. 96 ALR 1064.

Plea of guilty as affected by objection that it was not made by defendant per-

sonally. 110 ALR 1300.

Second offender, necessity of formal arraignment on charge of being, under statute enhancing penalty for second or subsequent offense. 116 ALR 229 and 139 ALR 689.

Misnomer of defendant in indictment or information, raising objection of, by plea in abatement. 132 ALR 410. Advice of counsel, plea of guilty with-

out. 149 ALR 1403.

Plea of nolo contendere or non vult contendere. 152 ALR 253 and 89 ALR 2d

Duty to advise accused of right to assistance of counsel. 3 ALR 2d 1003.

Admissibility of confession as affected by delay in arraignment of prisoner. 19 ALR 2d 1331.

Admonishing accused as to consequences of plea of guilty, duty of court to determine that he is advised thereof. 97 ALR

Assistance of counsel at or prior to arraignment, accused's right to. 5 ALR 3d 1269.

DECISIONS UNDER FORMER LAW

Once in Jeopardy

The plea of "once in jeopardy," authorized by former statute, included the plea of former conviction or acquittal, also authorized by same statute. State v. Keerl, 33 M 501, 515, 85 P 862, affirmed 213 US 135, 53 LEd 734, 29 SCt 469.

95-1607. Time allowed to answer. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one (1) day, to answer or otherwise plead to the indictment, information or complaint. The answer may include appropriate pretrial motions.

History: En. 95-1607 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-6516.

Cross-Reference

Defendant's right to reasonable time for preparation of trial after plea, sec. 95-1907.

Time for Entering Plea

Where time for entering plea arrived,

requiring defendant to plead to information, even though in absence of counsel, was not error and where defendant stood mute court properly entered a plea of not guilty for him. State v. Stevens, 119 M 169, 172 P 2d 299, 301.

Collateral References

Criminal Law 265.

22 C.J.S. Criminal Law § 410. 21 Am. Jur. 2d 457, Criminal Law, § 458.

95-1608. Irregularity of arraignment. No irregularity in the arraignment which does not affect the substantial rights of the defendant shall

affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such irregularity.

History: En. 95-1608 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

· The real question in all criminal cases on appeal is whether the substantial rights of the defendant have been adversely affected. The purpose of this section is to prevent reversal where the court has strayed from the procedure set forth, but the failure has not hindered the defense.

The burden is upon the defendant to object if any irregularity in connection with the arraignment is going to affect his defense. This does not override any of the defendant's substantial constitutional rights even though not objected to.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 113-6.

CHAPTER 17

PRETRIAL MOTIONS

Section 95-1701. Defenses and objections which may be raised before trial. 95-1702. Defenses and objections which must be raised before trial.

95-1703. Dismissal on motion of court or application of attorney prosecuting.

95-1704. 95-1705. Time of making motion.

Hearing on motion. Effect of determination. 95-1706.

95-1707. Transfer of trial. 95-1708. Motion for continuance.

95-1709. Substitution of judge. 95-1710. Change of place of trial.

95-1701. Defenses and objections which may be raised before trial. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion to dismiss or for other appropriate relief. The motion shall state with particularity the grounds therefor and the order or relief sought.

History: En. 95-1701 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Although the pre-trial motion is located at this point in the general arrangement of the code, various pre-trial motions will likely be made prior to the plea. This section covers the multitude of objections which can be raised before the commencement of trial. It includes all standard pre-trial objections as well as any valid objection the ingenuity of counsel can provide. The general theory of the entire chapter is to simplify the procedure for testing the validity of the information, indictment or complaint and the processes employed by the police, the prosecution and the judiciary in bringing a case to trial.

Compiler's Notes

A number of cases involving former statutes having no specific counterpart in the new Code of Criminal Procedure have been annotated under this chapter. Only those points which would be decided differently under the new code or which construe a repealed statute are designated as Decisions Under Former Law.

Collateral References

Plea of former jeopardy or of former conviction or acquittal where jury was

not sworn. 12 ALR 1006. Necessity of pleading double jeopardy by one relying on conviction of lesser offense as bar to prosecution for greater on new trial. 61 ALR 2d 1154.

Res judicata, modern status of doctrine in criminal cases. 9 ALR 3d 203,

95-1702. Defenses and objections which must be raised before trial. Defenses and objections based on defects in the institution of the prosecution or in the complaint, indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only before trial by motion to dismiss or for other appropriate relief. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment, information, or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

History: En. 95-1702 by Sec. 1, Ch. 196, L. 1967.

Source: Federal Rules of Criminal Procedure, Rule 12(b)(2).

Amendment of Information

There was no error in permitting information to be amended to allege prior conviction when there was no objection by defendant and defendant's attorney consented to its filing. State ex rel. Treat v. District Court, 122 M 249, 200 P 2d 248.

Attacking Charge on Remand

When a first conviction is set aside the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. State v. Hale, 129 M 449, 291 P 2d 229, 230, overruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Demurrer

The objection that the facts stated in an information do not constitute a public offense may be taken either by demurrer or at the trial, under a plea of not guilty, or after the trial, in arrest of judgment. State v. Smith, 58 M 567, 570, 194 P 131.

Defendant's demurrer to the information charging him with the crime of obtaining money by false pretenses on the ground that it failed to state a public offense was properly overruled by the trial court for the reason that the information contained all of the elements of the offense of obtaining money by false pretenses. State v. Lagerquist, — M —, 445 P 2d 910.

Demurrer Because Uncertain and Indirect

If a charge of crime is not direct and certain, it is open to attack on special demurrer. State v. Pemberton, 39 M 530, 533, 104 P 556.

Demurrer on the Grounds That the Action Is Barred by the Statute of Limitations

Where an information for a misdemeanor was filed more than one year and ten months after alleged offense, and it alleged that, on or about that time, the defendant left the state and afterwards resided without the state, the defendant could properly demur to the information on ground that prosecution was barred by the statute of limitations. State v. Clemens, 40 M 567, 571, 107 P 896.

Defendant was charged with taking and using an automobile without the consent of the owner, under section 94-3305, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by section 94-5703, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. State v. Atlas, 75 M 547, 549, 244 P 477.

Dismissal as a Bar

Dismissal of an information before defendant is called upon to plead or before the jury is impaneled and sworn does not bar a subsequent prosecution for the same offense. State v. Knilans, 69 M 8, 15, 220 P 91.

Dismissal Not Bar in Contempt Proceedings

While a contempt proceeding is criminal in its nature it is not a criminal prosecution, and where such a proceeding was dismissed before hearing without prejudice, and a new one was thereafter instituted by an attorney as relator, dismissal of the first citation did not constitute a bar to any further prosecution under former statute, and contemnor's special plea in bar was insufficient either to constitute a bar or a defense to the proceeding in contempt. State ex rel. Hall v. Niewoehner, 116 M 437, 449, 155 P 2d 205.

Facts Stated Do Not Constitute a Public Offense

Information charging a violation of section 94-1805 (obtaining money under false pretenses) which only avers that the defendant made a "false" or "fraudulent" representation is not sufficient. It must expressly allege the facts which made the stated pretense false. State v. Hale, 129 M 449, 291 P 2d 229, 232, distinguished in 135 M 449, 453, 340 P 2d 157, 160, over-

ruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Former Jeopardy

Former section providing that the dismissal of a prosecution for felony is not a bar to a second prosecution was not decisive of the question of former jeopardy. State v. Gaimos, 53 M 118, 121, 162 P 596.

Defendant charged with sale of intoxicating liquor to a minor was not placed in former jeopardy in violation of section 18, article III of the Montana constitution, by a dismissal of the complaint upon his demurrer in justice court without any further proceedings. State v. Moore, 138 M 379, 357 P 2d 346, 347.

How To Object to Information on the Grounds of Duplicity

An objection to an information on the grounds of duplicity is addressed to the jurisdiction of the court rather than to the form of the information and may be raised by an objection to the introduction of evidence and a motion to compel on election. State v. Mjelde, 29 M 490, 75 P 87.

Improper Joinder of Counts

The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction, but must be taken by demurrer. State v. Marchindo, 65 M 431, 435, 211 P 1093.

Motion In Arrest of Judgment

A motion in arrest of judgment must be founded on some defect in the information, and extrinsic evidence cannot be received at a hearing of such motion. State v. Tully, 31 M 365, 371, 78 P 760. See State v. Van, 44 M 374, 383, 120 P 479; State v. Caterni, 54 M 456, 458, 171 P 284.

Resort to evidence extrinsic to the information to show that it does not accurately state the facts is not permissible on motion in arrest. State v. Caterni, 54 M 456, 458, 171 P 284.

The motion in arrest of judgment challenges the jurisdiction of the state to enact, and of the court to enforce, the act under consideration. That question was raised, elaborated upon and decided against the contention here made in State v. Kahn, 56 M 108, 182 P 107; State v. Schaffer, 59 M 463, 467, 197 P 986.

The objection that the information does

The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment. State v. Wehr, 57 M 469, 188 P 930.

A motion in arrest of judgment lies only for certain defects on the face of the information not waived by failure to demur; hence where there was no demurrer filed and the information was sufficient, assignment of error that the trial court erred in denying the motion need not be considered. State v. Wong Sun, 114 M 185, 199, 133 P 2d 761.

Motion Proper Remedy When Information Has Been Filed Without Leave of Court

When an information has been filed without leave of court and before the examination and commitment of the defendant, an appropriate remedy is by motion to quash, upon the ground that the information was not presented as prescribed by law. State v. McCaffery, 16 M 33, 37, 40 P 63.

Order Sustaining Demurrer to Information Constitutes Judgment

Under former section, an order sustaining a demurrer to an information constituted a judgment. State v. Safeway Stores, Inc., 106 M 182, 197, 76 P 2d 81.

Presence of Unauthorized Person

Under former statute, the very appearance of an unauthorized person before the grand jury is sufficient to set aside the indictments, without a showing of prejudice. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

Presence of Unauthorized Person—Special Prosecutor Before Grand Jury

The appearance of "special prosecutor" before the grand jury was ground for setting aside the indictment under former statute. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

Presence While Indictment under Consideration

Under former section requiring indictment to be set aside when a person was present during session of grand jury and charge was under consideration, the case was "under consideration" when witnesses were being examined. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1044, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

Special Plea in Bar

A special plea in bar to a criminal proceeding is but a preliminary matter in nowise connected with the trial, since the

plea must be entered before the accused pleads to the merits. State ex rel. Odenwald v. District Court, 98 M 1, 6, 38 P 2d 269.

Waiver

If a defendant, on a second trial, does not ask to withdraw the plea of not guilty, interposed at the first trial, and have another and different plea substituted, it is a waiver of any grounds of objection to the information which might have been properly raised by motion to quash. State v. McCaffery, 16 M 33, 37, 40 P 63.

Failure to move to set aside information on ground that it had not been subscribed by the county attorney waived the objection to the action of the court in permitting the information to be subscribed before demurrer or plea. State v. Peterson,

24 M 81, 85, 60 P 809.

Defendant's failure to raise, by special demurrer, the question that an information charged two distinct offenses, contrary to former statute, constituted a waiver of such objection. State v. Mahoney, 24 M 281, 285, 61 P 647; State v. Rodgers, 40 M 248, 251, 106 P 3.

By entering his plea without a written motion to set aside the information, and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information. State v. Vinn, 50 M 27, 32, 144

P 773.

By pleading to the information without interposing a demurrer that the facts stated did not constitute a public offense, defendant waived objections to its sufficiency. State v. Fowler, 59 M 346, 352, 196 P 992.

By his failure to object to the information charging him with a violation of the Prohibition Act, before demurrer or plea, on the ground that it was filed prior to a preliminary hearing, defendant waived his right to challenge the foundation of the information. State v. Sorenson, 65 M 65, 70, 210 P 752.

What Is Waived by Motion in Arrest of Judgment

Where an information is attacked in the trial court by motion in arrest of judgment, all questions arising upon alleged defects in the information, except that of want of jurisdiction and the sufficiency of the facts to state a public offense, are waived. State v. Pemberton, 39 M 530, 533, 104 P 556; State v. Fowler, 59 M 346, 352, 196 P 992.

When Failure To Object by Motion Waives Objection

Where an accused person pleads to an information, without interposing the objection, by motion, that, having already

been prosecuted by indictment, he cannot be prosecuted by information, that objection is waived. State v. Vinn, 50 M 27, 33, 144 P 773.

When Insufficiency Does Not Warrant Dismissal

Insufficiency of the information does not warrant a dismissal of the action if in the opinion of the court the objection may be avoided by an amended information. State ex rel. Freebourn v. District Court, 105 M 77, 81, 69 P 2d 748.

Collateral References

Criminal Law \$\infty\$=105, 265; Indictment and Information \$\infty\$=133 (7), 137-139.

22 C.J.S. Criminal Law \\$\\$161, 312, 408; 42 C.J.S. Indictments and Informations §§ 193 et seq., 302, 327.

41 Am. Jur. 2d, Indictments and Informations, p. 1050 et seq., § 277 et seq.; p. 1065-1069, §§ 299-305.

Court's power to amend indictment in matters of form. 7 ALR 1517 and 68 ALR

Quashing indictment based on evidence illegally procured. 24 ALR 1432.

Privilege against self-incrimination be-fore grand jury as affecting validity of indictment. 27 ALR 147 and 38 ALR 2d 225.

Power of court to pass on competence, legality, or sufficiency of evidence on which indictment is based. 31 ALR 1479.

Motion to quash indictment as remedy for exclusion from grand jury of eligible class or classes of persons. 52 ALR 924.

Quashing indictment for lack or insufficiency of evidence before grand jury. 59 ALR 567.

Error in instructions by court to grand jury as ground for quashing indictment. 105 ALR 575.

Admissibility of testimony or affidavit of grand jurors for purpose of impeaching indictment, 110 ALR 1023.

Right of accused to attack indictment or information after reversal or setting aside of conviction. 145 ALR 493.

Certiorari after judgment to test sufficiency of indictment or information as regards the offense sought to be charged. 150 ALR 743.

Presence in jury room of persons other than grand juror as affecting indictment. 4 ALR 2d 392.

Reconsideration and sustaining of motion to quash previously made by accused as waiver of plea of former jeopardy. 63 ALR 2d 805.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory. 4 ALR 3d 404.

DECISIONS UNDER FORMER LAW

A number of cases involving former statutes having no specific counterpart in the new Code of Criminal Procedure have been annotated under this chapter. Only those points which would be decided differently under the new Code or which construe a repealed statute are designated as Decisions Under Former Law.

Attorney General's Presence before Grand Jury

Former statute providing that indictment must be set aside when a person is permitted to be present during session of grand jury did not affect right of the attorney general to be present before the grand jury. State ex rel. Nolan v. District Court, 22 M 25, 31, 55 P 916.

Bill of Particulars

Former section providing that the only pleading on part of defendant was either a demurrer or a plea was exclusive and there is no section of the former Criminal Code directing or requiring a bill of particulars to be furnished to a defendant charged with a criminal offense. State v. Bosch, 125 M 566, 242 P 2d 477, 487.

Demurrer

Section stating when a demurrer, if allowed, would bar another prosecution was intended to safeguard the rights of the accused against an altogether unwarranted prosecution, or the possible malice of the prosecuting officer, but was not intended to shield an offender against prosecution merely because of some technical defect, irregularity, or insufficiency in the original information or indictment. State v. Vinn, 50 M 27, 34, 144 P 773; In re Palm, 52 M 558, 560, 160 P 348.

Under former law providing for the filing of demurrers, a defendant could wait until the ruling upon the demurrer before entering his plea. State ex rel. Sullivan v. District Court of Second Judicial Dist., 150 M 203, 433 P 2d 146.

Dismissal as a Bar

Under former statute making dismissal a bar to subsequent prosecution except if offense was a felony, dismissal of second information filed with leave of court, charging the same offense, burglary, upon which a prior information had been dismissed one month previous for failure to bring the cause to trial within six months after filing, held erroneous under this section, burglary being a felony. State v. McGowan, 113 M 591, 593, 131 P 2d 262.

Under former statute, held that in a justice of the peace proceeding where a complaint is dismissed upon request by the

state so that a new complaint may be issued which is substantially the same as the first complaint but amends it as to the time the offense was committed, such dismissal is not a bar to the prosecution for the misdemeanor. State ex rel. Borberg v. District Court, 125 M 481, 240 P 2d 854, 857, 859 to 861, distinguished in 130 M 299, 302, 300 P 2d 952, 953 and in 138 M 379, 381, 357 P 2d 346.

Defense of bar arising under former statute from dismissal of misdemeanor could properly be raised by a plea of not guilty, and all matters in proof thereof were admissible under the plea. State v. Porter, 130 M 299, 300 P 2d 952, 954.

Former statute making dismissal a bar to subsequent prosecution except if offense was a felony applied only to offenses for which an information was filed or an indictment found. State v. Moore, 138 M 379, 357 P 2d 346, 347.

Failure To Endorse Names on Indictment

Indictment must be set aside where witnesses' names on indictment were Richard Roe and John Doe and witnesses' real names were not supplied to defendant and if there were no witnesses that fact should be shown by the prosecution either by a verified pleading or under oath. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1043. (In this case it was said that if other grounds had not required setting aside of indictment, court would have been disposed to return case to trial court to permit defendant to interrogate prosecutor and grand jury foreman as to whether there were witnesses whose names were not endorsed on indictment.)

If person has gone to trial under indictment on which witnesses' names were designated as Richard Roe and John Doe and convicted the supreme court would be required to sustain the conviction if possible and burden would be on defendant to show prejudice. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1043.

Where timely motion was made before trial former statute required the indictment to be set aside when names of witnesses were not endorsed on indictment. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1043.

Where district court was ordered to set aside indictment because witnesses' names were not endorsed thereon, prosecution for the offenses charged was not barred but the cases were ordered resubmitted to the county attorney for filing of such information as he believed necessary. State

ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1051, distinguished in 131 M 254, 261, 309 P 2d 316, 320.

Grounds Exclusive

The grounds for setting aside an indictment of a grand jury as set forth in former statute are exclusive. State ex rel. Porter v. District Court, 124 M 249, 220 P 2d 1035, 1037.

More than One Offense

Where an information charges two distinct offenses, as prohibited by former statute, the remedy is not by motion to compel the county attorney to elect, as between the two offenses charged, the one upon which he will seek conviction; the objection can only be taken by demurrer; and the objection, so far as any question of pleading is concerned, is waived by pleading over and failing to demur. State v. Kanakaris, 54 M 180, 182, 169 P 42.

The objection that the information states more than one offense, as prohibited by former statute, can only be made by demurrer, and when not made before plea is waived. State v. Toy, 65 M 230, 233, 211 P 303.

Motion in Arrest of Judgment

A motion in arrest of judgment was required to be founded on some defect in the information mentioned in former section setting forth grounds of demurrer and extrinsic evidence could be received on the hearing of such motion. State v. Tully, 31 M 365, 371, 78 P 760. See State v. Van, 44 M 374, 383, 120 P 479; State v. Caterni, 54 M 456, 458, 171 P 284.

Under former statute stating grounds for demurrer a motion in arrest lay only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. State v. Caterni, 54 M 456, 458, 171 P 284.

Motion Must Be in Writing

Motion to set aside indictment or information was required to be in writing, subscribed by the defendant or his counsel, and to specify the particular ground of objection. State v. Chevigny, 48 M 382, 384, 138 P 257.

Setting aside Information

Former section stating when indictment or information must be set aside was construed, not as prescribing one indispensable method of procedure, and one only, but as pertaining to the two constitutional methods of procedure where an information was filed, neither one of which was indispensable, yet either of which was correct, as the conditions and facts of the case might warrant. State v. Bowser, 21 M 133, 136, 53 P 179.

Sufficiency of Information

An information which charges defendant with an infamous act against nature and then in describing the manner in which the crime was committed alleges an assault is not open to the charge that it is duplicitous. Allegations with respect to the assault are merely descriptive of the means of accomplishing the infamous crime against nature which never could be perpetrated against an unwilling participant without an assault. State v. McSloy, 127 M 265, 261 P 2d 663, 664.

Waiver

The objection that the information states more than one offense, as prohibited by former statute, can only be made by demurrer, and when not made before plea is waived. State v. Toy, 65 M 230, 233, 211 P 303.

Where More Than One Offense Not Stated

In prosecution for embezzlement of city water rentals, information alleging that employee did on a certain day in 1931 "and from thence continuously" on divers dates to a given date two years later receive public funds aggregating a given amount which he failed to pay over to the city treasurer, held not open to objection of stating more than one offense nor being duplicitous, under the rule that in such case there is no duplicity where the embezzlement is accomplished by a continuous series of acts, which the state might treat as constituting one embezzlement, irrespective of ordinance requiring daily accounting. State v. Kurth, 105 M 260, 262, 72 P 2d 687.

95-1703. Dismissal on motion of court or application of attorney prosecuting. The court may, either on its own motion or upon the application of the attorney prosecuting, and in furtherance of justice, order an action, complaint, information, or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

History: En. 95-1703 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-9505.

Dismissal on Application of Prosecutor

The filing of second information, alleging same facts as contained in first information, was in fact an amendment in

a matter of substance of the first information in violation of defendant's rights under statute proscribing amendments in a matter of substance, which defendant, represented by competent counsel, waived for failure to raise timely objection, and which defect could have been rectified in the first instance if the prosecuting attorney had availed himself of the statute providing for the dismissal of information by having the first information dismissed and then filing a second information. Gransberry v. State 149 M 158, 423

"In Furtherance of Justice"

Since the legislature did not define the phrase "in furtherance of justice" as used in predecessor to this section, it is left for the court's judicial discretion, exercised in view of a defendant's constitutional rights and the interests of society, to determine what particular grounds warrant dismissal of a pending criminal action, and mandamus will not issue to control the court's discretion. State ex rel. Anderson v. Gile, 119 M 182, 172 P 2d 583, 585.

Operation and Effect

After dismissal of an indictment because of substantial defects therein, the district court may, but is not required to, submit the case to another grand jury, or permit, or order, the county attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. State v. Vinn, 50 M 27, 33, 144 P 773.

Prompt Trial

Under former statute providing that court shall dismiss charges against a defendant who is not brought to trial within six months after the filing of the information unless the trial has been postponed upon application of defendant, defendant was entitled to dismissal, even though defendant had demurred to the information and had not entered a plea, since county attorney had failed to call

up the demurrers for a hearing as he was entitled to do before the six-month period had expired. State ex rel. Sullivan v. District Court of Second Judicial Dist., 150 M 203, 433 P 2d 146.

Although the defendant was not brought to trial within six months after the filing of the information as required under former law, the defendant was not denied his right to a speedy trial because trial had originally been set for a date within the six-month period and was removed from the trial calendar only when the defendant sought supervisory control on an original procedure filed in the supreme court, even though the cause was not set for trial until two months after the supreme court had denied defendant's petition for supervisory control and returned the matter to the trial court. State v. Lagerquist, - M -, 445 P 2d 910.

Collateral References

Criminal Law 7178, 303, 576. 22 C.J.S. Criminal Law §§ 253 et seq., 456 et seq., 468 et seq. 21 Am. Jur. 2d 503 et seq., Criminal

Law, § 512 et seq.

Vacation or destruction of indictment as terminating liability of sureties on bail bond. 20 ALR 600.

Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity. 66 ALR 1378.

Court's power to enter nolle prosequi or dismiss prosecution. 69 ALR 240.

Validity and effect of agreement by prosecuting officer to extend immunity as regards particular charge upon condition that defendant plead guilty to another charge. 85 ALR 1177.

Court's duty or power as to continuation of prosecution upon refusal of prosecuting officer to proceed therewith. 103 ALR 1253.

Power of trial court to dismiss defendant for insufficiency of evidence after submitting a case to jury or after verdict of guilty. 131 ALR 187.

DECISIONS UNDER FORMER LAW

Prompt trial

Under former section one charged with crime was entitled to a dismissal of the information whether he was imprisoned in the county jail or at liberty upon bail, if not brought to trial within six months after its filing, unless the state could show good cause why dismissal should not follow. State v. Arkle, 76 M 81, 86, 245 P 526.

That trial judge deemed it unwise, inexpedient and unnecessary to call a jury during the term at which a defendant should have been tried in order to come within the limitation of six months prescribed by former statute for bringing him to trial, held not "good cause" justifying denial of motion for dismissal. State v. Arkle, 76 M 81, 86, 245 P 526.

A defendant was not entitled, under former statute, to a dismissal of charge against him on ground that he was not brought to trial within six months after the information was filed if the delay was caused by a mistrial. State v. Turlok, 76

M 549, 558, 248 P 169.

Where defendant was tried within a week after the offense was committed, section 16, article III of the constitution, providing for a speedy trial was complied with, but where, after conviction, he appealed to the district court for a trial de novo, he did not have the benefit of former section providing for dismissal of prosecution when not postponed on defendant's application if not brought to trial within six months, the section having no application under such facts. State v. Schnell, 107 M 579, 582, 88 P 2d 19.

Statutes providing for the discharge of one accused of crime unless trial is had within a stated time after filing of information or indictment, are enacted for the purpose of enforcing the constitutional right to a speedy trial, section 16, article III of the constitution. State v. McGowan,

113 M 591, 594, 131 P 2d 262.

Under former section whether motion to dismiss information because of delay in trial should be granted depended on whether or not "good cause" was shown for delay. State v. Saginaw, 124 M 225, 220 P 2d 1021, 1025; State v. McRae, 124 M 238, 220 P 2d 1025, 1027, distinguished in 130 M 299, 301, 300 P 2d 952, 953.

Under former statute permitting dismissal for failure to bring accused to trial within six months, time clapsing between the date the demurrer to the information was erroneously sustained and date of the remittitur of the supreme court reversing the decision was to be excluded from six months' period. State v. Israel, 124 M 152, 220 P 2d 1003, 1013.

95-1704. Time of making motion. The motion shall be made before the plea is entered, but the court for cause may permit it to be made within a reasonable time thereafter.

History: En. 95-1704 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Defense counsel has the responsibility to act with reasonable dispatch in raising

In determining that defendants' right to a speedy trial had not been violated, under the constitution provision that an accused shall have the right to a speedy public trial and under former statute providing for the dismissal of an action not brought to trial within six months after the filing of an information so long as the trial has not been postponed upon the application of defendant, the court counted the days of delay which had not been caused by defendants, the sum total of which was less than six months, notwithstanding the fact that more than six months had passed after the filing of the information. State ex rel. Thomas v. District Court of Thirteenth Judicial Dist., 151 M 1, 438 P 2d 554.

Waiver

Under former statute providing for dismissal if accused is not brought to trial within six months after filing of information, it was only by making timely objection before actively participating in the trial that defendant could avail himself of the right to have the prosecution dismissed; hence where motion to dismiss on that ground was not made until the trial had commenced and the jury had been sworn, he waived the right. State v. Test, 65 M 134, 136, 211 P 217.

Under former statute authorizing dismissal of information if accused was not brought to trial within six months, accused who entered plea of not guilty without objecting to failure to bring him to trial within statutory period waived the delay; even had the objection been raised, good cause not to dismiss information existed since punishment was to commence from expiration of prior sentence. Petition of Duran, — M —, 448 P 2d 137.

defenses not going to the merits of the case. Failure to notice technical defects results in waiver.

Source: Federal Rules of Criminal Procedure, Rule 12(b)(3).

95-1705. Hearing on motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

History: En. 95-1705 by Sec. 1, Ch. 196, L. 1967.

Source: Federal Rules of Criminal Procedure, Rule 12(b)(4).

95-1706. Effect of determination. If a motion is determined adversely to the defendant he shall plead if he has not previously pleaded. A plea

previously entered shall stand. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or, if admitted to bail, his bail exonerated, or money deposited instead of bail must be refunded to him. However, if the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, or when it appears at any time before judgment that a mistake has been made in charging the proper offense, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new complaint, indictment or information.

History: En. 95-1706 by Sec. 1, Ch. 196, L. 1967.

Source: Federal Rules of Criminal Procedure, Rule 12(b)(5); and Revised Codes of Montana 1947, section 94-9504.

Collateral References

Bail 74 (1); Criminal Law 302 (1); Indictment and Information 140, 144. 8 C.J.S. Bail § 53, 79; 22A C.J.S. Criminal Law § 456-465; 42 C.J.S. Indictments and Informations § 215, 224-226.

95-1707. Transfer of trial. If the court determines that the motion to dismiss, based upon the grounds of lack of jurisdiction or improper place of trial, is well founded it may, instead of dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

History: En. 95-1707 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-1(f).

- 95-1708. Motion for continuance. (a) The defendant or the state may move for a continuance. If the motion is made more than thirty (30) days after arraignment or at any time after trial has begun the court may require that it be supported by affidavit.
- (b) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.
- (c) All motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant.
- (d) This section shall be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the state to a speedy trial.

History: En. 95-1708 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

If something has occurred that makes it difficult or impossible to meet established dates set for a case this "something" should be brought to the attention of the trial court and a ruling made. An example of the various kinds of reasons that might be grounds for a continuance are loss of a material witness, death or illness of the attorneys, or pre-trial publicity.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-4; Revised Codes of Montana 1947, sections 94-9502 and 94-9503.

Absence of Witnesses

An affidavit, filed on the day set for trial, in support of a motion for a continuance on the ground of the absence of witnesses, which fails to disclose the date upon which such witnesses left the state, is insufficient. State v. Showen, 60 M 474, 476, 199 P 917.

An affidavit in support of continuance on ground of absence of witnesses must disclose specifically the facts expected to be proved by the absent witnesses, and set forth that if such witnesses were preent they would testify to those facts; the general statement that, if present, they would testify to facts material to affiant's defense being insufficient. State v. Showen, 60 M 474, 476, 199 P 917.

An affidavit in support of continuance on ground of absence of witnesses must disclose that the facts which defendant expects to prove by the absent witnesses cannot be proved by other witnesses available at the trial; since a continuance for the purpose of obtaining evidence which would be merely cumulative need not be granted. State v. Showen, 60 M 474, 476, 199 P 917.

Prejudice of Potential Jurors

In the absence of a showing of abuse of discretion an order refusing continuance of a criminal trial, asked for on the grounds that a large portion of the persons qualified for jury duty in the county were prejudiced, will be affirmed. State v. Collins, 88 M 514, 519, 294 P 957.

Collateral References

Criminal Law \$578, 580, 583, 588. 22A C.J.S. Criminal Law \$482 et seq. See generally, 17 Am. Jur. 2d 147 et seq., Continuances, § 27 et seq.; 47 Am. Jur. 2d 957, Justices of the Peace, § 72.

Extradition, right of one arrested for purpose of, to continuance to enable him to present evidence that he is not subject to extradition. 11 ALR 1410.

Alibi, right to continuance to procure witness to. 41 ALR 1530.

Continuance to permit proof of allegation that Negroes were excluded from jury list in criminal case. 52 ALR 930.

Right to continuance because counsel is in attendance at another court. 112 ALR

Hostile sentiment or prejudice as ground for continuance of criminal trial. 39 ALR

Right of accused to continuance because of absence of witness who is fugitive from justice. 42 ALR 2d 1229.

Counsel's absence because of attendance on legislature, as ground for continuance. 49 ALR 2d 1073.

Continuance of criminal case because of

illness of accused. 66 ALR 2d 232. Continuance of criminal case because of illness or death of counsel, 66 ALR 2d 267.

Withdrawal or discharge of counsel in criminal case as ground for continuance. 66 ALR 2d 298.

Accused's right to communicate with his attorney, scope and extent, and remedy or sanctions for infringement of. 5 ALR

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 ALR 3d 1180.

95-1709. Substitution of judge. (a) The defendant or the prosecution may move the court in writing for a substitution of judge on the ground that he cannot have a fair and impartial hearing or trial before said judge. The motion shall be made at least fifteen (15) days prior to the trial of the case, or any retrial thereof after appeal, except for good cause shown. Upon the filing of such a motion the judge against whom the motion is filed shall be without authority to act further in the criminal action, motion or proceeding but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the criminal action or proceeding to some other court, nor to the power of calling in another judge to sit and act in such criminal action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. Not more than one (1) judge can be disqualified in the criminal action or proceeding, at the instance of the prosecution and not more than one (1) judge at the instance of the defendant or defendants.

If either party in any matter above-mentioned shall file the motion as herein provided such party may not complain of any reasonable delay as the result thereof.

The provision of this section shall be inapplicable to any person in any cause involving a direct contempt of court.

(b) In addition to the provision of subsection (a) any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion.

History: En. 95-1709 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Source: Revised Codes of Montana 1947, section 94-6913; and Illinois Code of Criminal Procedure, Chapter 38, section 114-5.

Right to Disqualify Judge

Section 93-901, which applies only to civil cases, is inapplicable to disqualification of judge in a criminal proceeding. In re Larocque's Petition, 139 M 405, 365 P 2d 950, 951.

The right to disqualify a judge in a criminal proceeding is purely statutory. It has no constitutional nor common-law basis. Therefore, statutory conditions precedent must be followed. In re Larocque's

Petition, 139 M 405, 365 P 2d 950, 951. Where defendant filed no affidavit for disqualification of judge in criminal proceeding he waived the provisions of predecessor section. In re Larocque's Petition, 139 M 405, 365 P 2d 950, 951.

Second Arraignment

Where affidavit of disqualification was presented after time set for arraignment, but quashed because of untimeliness, arraignment was "irregular" but not unlawful or wrongful, and in view of defendant's rights to due process possibly being violated, new judge, before whom trial had been set, was ordered to hold another arraignment. State ex rel. McNeal v. District Court, 144 M 550, 399 P 2d 997.

Timely Motion

Predecessor section required affidavit of disqualification to be made fifteen days before trial on the merits, and a motion by the state to disqualify made after the trial and pending a motion for new trial was not timely. State ex rel. Wilson v. District Court, 143 M 543, 393 P 2d 39.

Collateral References

Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge. 5 ALR 1275 and 46 ALR 1179.

Time when prejudice was discovered, necessity of including averment as to, in affidavit contemplated by statute entitling parties to substitution of another judge upon filing affidavit of prejudice or unfairness of judge. 93 ALR 239.

State's right to file affidavit disqualifying judge for bias or prejudice. 115 ALR

866.

Disqualification of judge in proceeding to punish contempt against or involving himself or court of which he is a member. 64 ALR 2d 600.

Law Review

Affidavit for Disqualification of a District Judge for Imputed Bias In a Criminal Case Not Timely After Verdict (State ex rel. Wilson v. District Court, 143 M 543, 393 P 2d 39) 26 Mont. L. Rev. 128 (1964).

- 95-1710. Change of place of trial. (a) The defendant or the prosecution may move for a change of place of trial on the ground that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county. The motion shall be made at least fifteen (15) days prior to trial, unless, for good cause shown, it may be made thereafter.
- The motion shall be in writing and supported by affidavit which shall state facts showing the nature of the prejudice alleged. The defendant or the state may file counteraffidavits. The court shall conduct a hearing and determine the merits of the motion.
- If the court determines that there exists in the county where the prosecution is pending such prejudice that a fair trial cannot be had it shall transfer the cause to any other court of competent jurisdiction in any county where a fair trial may be had.

History: En. 95-1710 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section preserves the fair trial rule allowing a change of venue when it appears impossible to draw an impartial jury.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-6.

Application

Trial court was in error for refusing to grant a change of venue where evidence disclosed that local newspapers had fanned the feeling of the community against the defendant and that county officials themselves felt that feeling against the defendant was so high that they moved him for safety to the state prison. State v. Dryman, 127 M 579, 269 P 2d 796, 800.

(Dissenting opinion, 127 M 579, 269 P

2d 796, 801.)

Where supreme court ordered a new trial and that it be had in some county or adjacent to Toole county because of the prejudice of the people in Toole county, trial court erred in directing that the new trial take place in Teton county. Although Teton county is not adjoining Toole county but is separated by some twenty miles, yet the word adjacent has no arbitrary meaning or definition; the no arbitrary meaning or definition; the term is a relative and not an absolute one, and the exact meaning of which, in any particular case, is determinable principally by the context in which it is used. State ex rel. Dryman v. District Court, 128 M 402, 276 P 2d 969, 970.

Application Necessary

Defendant in a criminal proceeding was not entitled to a change of venue where files did not contain any application for a change of place of trial. In re Larocque's Petition, 139 M 405, 365 P 2d 950, 951.

Discretion

An application for a change of place of trial is addressed to the sound discretion of the trial court and a clear abuse of discretion must be shown, or the ruling of the trial court will not be disturbed. State v. Bischert, 131 M 152, 308 P 2d 969, 971; In re Larocque's Petition, 139 M 405, 365 P 2d 950, 951.

Opinion of Defendant

Where the affidavits of defendant's motion for a change of venue stated that "in the opinion" of the defendant he would not receive a fair trial in the county of the alleged crime and set forth reasons for that opinion but failed to show compelling evidence in support of the motion, it was not an abuse of discretion for the trial court to deny the motion. State v. Barick, 143 M 273, 389 P 2d 170.

"Place" Defined

In the expression "place of trial," the word "place" primarily means county, and not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue." State ex rel. Sackett v. Thomas, 25 M 226, 237, 64 P 503.

Prejudice of Judge

In support of an application for change of place of trial a denial of bail could not be claimed as showing prejudice by the trial judge for such is a mere preliminary matter and has nothing to do with the trial on the merits. State v. London, 131 M 410, 310 P 2d 571, 580.

Action of a judge in refusing to set bond pending appeal from a manslaughter conviction is not an act which prejudices a defendant during a trial. State v. Bischert, 131 M 152, 308 P 2d 969, 971.

Collateral References

Criminal Law 117, 123. 22 C.J.S. Criminal Law 186 et seq. 21 Am. Jur. 2d 415 et seq., Criminal

Law, § 398 et seq.; 56 Am. Jur., Venue, p. 47 et seq., § 42 et seq.; p. 61 et seq., § 60 et seq.

Jurisdiction or power of courts of respective districts as to subsequent proceedings, as affected by dismissal, nolle prosequi or mistrial after change of venue in criminal case. 18 ALR 714.

Power as to withdrawal or modification of order granting change of venue. 59 ALR 362.

State's right to change of venue in criminal case. 80 ALR 355 and 161 ALR 949.

Number of changes of venue, statute limiting. 104 ALR 1497.

Right of state to certiorari to compel change of venue in criminal case, 109 ALR 797 and 91 ALR 2d 1097.

Interlocutory order of one judge concerning change of venue as binding on another judge in same case. 132 ALR 72.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like. 38 ALR 2d 738.

Law Review

Criminal Law: Extensive Publicity May Prevent a Fair Trial (People v. Jacobson, 46 Cal. Rptr. 515, 405 P. 2d 555) 27 Mont. L. Rev. 205 (1966).

CHAPTER 18

PRODUCTION AND SUPPRESSION OF EVIDENCE

Section 95-1801. Subpoenas.

Depositions. 95-1802.

Discovery, inspection, and notice. 95-1803.

Motion to produce confession or admission. 95-1804. Motion to suppress confession or admission.

95-1806. Motion to suppress evidence illegally seized.

- 95-1801. Subpoenas. (a) Upon the request of the prosecuting attorney or the defendant or his attorney, the court or the clerk of the court shall issue subpoenas. The subpoena shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony and produce objects and documents at the time and place specified therein.
- (b) Indigent Defendants. When the defendant is indigent a court order must be obtained if more than six (6) witnesses are to be subpoenaed. If a witness is to be paid more than the regular fee, or there are more than six (6) witnesses to be paid an order of the court or judge is needed; such order may be made upon proper showing by affidavit or otherwise.
- (c) Expenses of Witness. When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, the judge, at his discretion, by a written order, may direct the clerk of the court to draw his warrant upon the county treasurer in favor of such witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness.
- (d) In all criminal cases originally triable in the district court the following rules shall apply:
- (1) Upon motion of either party and upon showing of good cause, the court may issue a subpoena prior to the trial directing any person other than the defendant to produce books, statements, papers and objects before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and the court may, upon their production, permit the books, statements, papers or objects or portions thereof to be inspected, copied, or photographed by the parties and their attorneys.
- (2) Upon motion of the defendant, within a reasonable time before trial, the court may, upon a showing of good cause, at a time and place designated by the court, order the prosecution to produce prior to trial for inspection, photographing or copying by the defendant, designated books, statements, papers, or objects obtained from the defendant or others by the prosecution which are material, relevant and necessary to the preparation of the defendant's case.
- (e) Service. A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than eighteen (18) years of age, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the state or of the defendant. The person making the service must without delay, make a written return of the service, subscribed by him, stating the time and place of service. Service of a subpoena shall be made by delivering a copy thereof to the person named, and if ordered by the court, by tendering to those residing outside the county of trial the fee for one (1) day's attendance and the mileage allowed by law.
- (f) Place of Service. A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of Montana.

History: En. 95-1801 by Sec. 1, Ch. 196, Rev. L. 1967.

Revised Commission Comment

If any one witness is to be paid more than the usual fee, a court order is needed.

The trial judge has ample discretion to pay what he believes reasonable in the particular case. The provision does not attempt to particularize any of the expenses which might occur.

The discovery allowed under subsection (d) is a two-part mechanism for gathering information. Under paragraph (1) either party may require a third person, other than the defendant, through the use of a subpoena (section 93-1501-3), to produce certain articles. The only restriction is that good cause must be shown. This allows what is sometimes referred to as a "fishing expedition"—but only where third parties are concerned. The second paragraph permits discovery by the defendant or the prosecution with the additional restriction that the object desired must be "material, relevant and necessary to the preparation of the case."

Cross-References

Examination of witnesses on commission, Title 94, ch. 92.

Fees of witnesses, sec. 25-404.

Mileage of witnesses, sec. 59-801. Right to process to compel attendance of

witnesses, Mont. Const. Art. III, § 16.

Subpoena for witness defined, sec. 93-1501-3.

Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases, Title 94, ch. 90.

Witnesses' fees, sec. 25-404.

Imprisoned Witnesses

Where state court desired that prisoner be produced for use as witness, and custodian was not sheriff of county in which court requiring prisoner sat, writ of habeas corpus held necessary, notwith standing former section providing for temporary removal of imprisoned witnesses

by order of trial court. United States v. Schultz, 37 F 2d 619.

More than Six Witnesses

It is proper for the court to require the defendant, upon request for a subpoena for additional witnesses, to disclose the materiality of their testimony. State v. O'Brien, 18 M 1, 12, 43 P 1091, 44 P 399.

Former statute providing that clerk should not subpoen amore than six witnesses for each party except upon order of court was to control the expenses of the county and is a limitation upon the clerk of the court and not upon the judge. Where the court allows more than six witnesses to testify for the state the defendant is not prejudiced by the absence of an express order made by the court. State v. Cockrell, 131 M 254, 309 P 2d 316, 321.

Collateral References

Witnesses 28, 10, 21, 22.

97 C.J.S. Witnesses §§ 19 et seq., 44. 58 Am. Jur. 30 et seq., Witnesses, § 13 et seq.

Privilege of corporate officers to refuse to produce books and records before grand jury. 27 ALR 145.

Duration of imprisonment for refusal to answer question before grand jury. 28 ALR 1364.

Refusal to answer questions on cross-examination as ground for new trial or reversal, 57 ALR 70.

Uniform act to secure attendance of witnesses from without state in criminal proceedings. 44 ALR 2d 732.
Right of witness detained in custody

Right of witness detained in custody for future appearance to fees for such detention. 50 ALR 2d 1439.

Accused's right to interview witness held in public custody. 14 ALR 3d 652.

95-1802. Depositions. (a) Grounds for Taking Depositions:

- (1) If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing or is or may become a nonresident of the state, or is unwilling to provide relevant information to a requesting party, and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court, at any time after the preliminary hearing or the filing of the indictment or the information, may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place.
- (2) If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court must direct that his deposition be taken at the expense of the state. After the deposition has been subscribed the court shall discharge the witness.

- (b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.
- (c) How Taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.
- (d) Filing Deposition. The court shall transmit the deposition to the clerk of the court making the order, there to be filed and held until the action shall come on for trial.
- (e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the state of Montana unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts. For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross-examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used.
- (f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.
- (g) At Instance of the State or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the state or a witness. The officer having custody of a defendant shall be notified of the time and place set for examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The state shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Depositions in criminal cases are only to be used to avoid the loss of a witness material to the case. Subsection (g) protects the rights of personal confrontation and cross-examination of the witness by the defendant.

Accused's Rights

Accused's rights were not violated on theory that witness was intimidated into

giving damaging testimony by county attorney's threat of hold witness unless she gave a statement when witness gave a statement in which she alleged she had given defendant money to buy a six-shooter. Petition of Gallagher, 150 M 476, 436 P 2d 530.

When Taken

There is not any limitation as to the time when depositions in criminal cases may be taken; former statutes providing for conditional examination of witnesses, before or after charge is filed, and for deposing of material witnesses who could not give security for appearance at least implied that depositions might be taken at any time after the defendant had been theld to answer the charge, even before an information had been filed against him. State v. Vanella, 40 M 326, 337, 106 P 364.

Collateral References

Witnesses \$\infty\$4; Depositions \$\infty\$6, 17, 57, 79, 87.

26 C.J.S. Depositions §§ 8, 16, 51, 58 et seq., 88 et seq., 100; 97 C.J.S. Witnesses § 12 et seq.

§ 12 et seq.
23 Am. Jur. 2d, Deposition and Discovery, p. 374 et seq., § 26 et seq.; p. 380 et seq., § 34 et seq.

Prosecuting attorney's consent to taking of depositions without complying with conditions prescribed by statute. 27 ALR 1041.

Making copies of records or writings part of deposition. 59 ALR 530.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 ALR 377.

Submitting to jurisdiction by seeking relief as to deposition. 111 ALR 933.

Sufficiency of showing of grounds for admission of depositions in criminal cases. 44 ALR 2d 768.

95-1803. Discovery, inspection, and notice. In all criminal cases originally triable in district court the following rules shall apply:

- (a) List of Witnesses:
- (1) For the purpose of notice only and to prevent surprise, the prosecution shall furnish to the defendant and file with the clerk of the court at the time of arraignment, a list of the witnesses intended to be called by the prosecution. The prosecution may, any time after arraignment, add to the list the names of any additional witnesses, upon a showing of good cause. The list shall include the names and addresses of the witnesses.
- · (2) The requirement of subsection (a) (1), of this section, shall not apply to rebuttal witnesses.
- (b) Subpoenas may be used as a discovery device as provided for under section 95-1801 (d).
- (c) On motion of any party within a reasonable time before trial all parties shall produce at a reasonable time and place designated by the court all documents, papers or things which each party intends to introduce in evidence. Thereupon any party shall, in the presence of a person designated by the court, be permitted to inspect or copy any such documents, papers or things. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. If the evidence relates to scientific tests or experiments the opposing party shall, if practicable, be permitted to be present during the tests and to inspect the results thereof. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make other appropriate orders. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule he shall promptly notify the other party or his attorney or the court of the existence of the additional material. The

court shall exclude any evidence not presented for inspection or copying pursuant to this rule, unless good cause is shown for failure to comply. In the latter case the opposing party shall be entitled to recess or a continuation during which it may inspect or copy the evidence in the manner provided for above.

- (d) For purpose of notice only and to prevent surprise, the defendant shall furnish to the prosecution and file with the clerk of the court at the time of entering his plea of not guilty or within ten (10) days thereafter or at such later time as the court may for good cause permit, a statement of intention to interpose the defense of insanity, self-defense or alibi. If the defendant intends to interpose any of these defenses, he shall also furnish to the prosecution and file with the clerk of the court, the names and addresses of all witnesses to be called by the defense in support thereof. The defendant may, prior to trial, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses, unless the name is included on such list, except upon good cause shown.
- (e) All matters which are privileged upon the trial, are privileged against disclosure through any discovery procedure.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Section 95-1503 (d) of Chapter 15 requires the state to endorse the names of the witnesses for the state on the indictment or information. The motion under this section permits the defendant to get a list at any time, probably after arraignment and before trial. Many times the state does not know before it files the indictment or information all the witnesses it may call.

Further, this provision allows the addition of names not only prior to trial, but after the trial has commenced. As the trial progresses, the showing which is necessary to establish "good cause" should be more stringent. At any time, the judge may allow a continuance (section 95-1708) if it should appear necessary in the inter-

est of justice.

Subsection (c) requires the defendant to permit the prosecution to inspect items which he intends to produce at trial and which are within his possession, custody or control. This provision allows mutual disclosure so far as consistent with the privilege against self-incrimination. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at trial is not a violation of the privilege against self-incrimination. Jones v. Superior Court, 58 Cal 2d 56, 22 Cal Rptr 879, 372 P 2d 919 (1962); People v. Lopez, 60 Cal 2d 223, 32 Cal Rptr 424, 384 P 2d 16 (1963).

To allow the court to control the potential abuses of discovery, this subsection gives the court wide authority to deny, restrict or defer discovery. Some of the things the court will consider in determining whether discovery should be allowed are the safety of witnesses, and others, the protection of business enterprises from economic reprisal and infringement of the right against self-incrimination.

The party asking for the restriction of discovery need not make a showing in open court. If the court grants relief based on a showing in a closed hearing a record of the proceedings must be preserved in the records of the court to be made available to the appellate court in the event of ap-

peal.

This provision establishes a continuing obligation on a party subject to a discovery order with respect to material obtained

after initial compliance.

Wide discretion is given to the court in dealing with the failure of either party to comply with the discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying the prejudice by a continuance, and other relevant factors. Admissibility into evidence is not a prerequisite to discovery.

When insanity, alibi, or self-defense are to be alleged as defenses, notice is required to avoid surprise and to provide a fair determination of the issues by a knowledgeable presentation of the facts by both the prosecution and defense. Defendant's failure to give the required notice as set

forth in subsection (d) precludes the use has the discretion to allow such notice at of such a defense. However, the judge a later time.

- 95-1804. Motion to produce confession or admission. (a) On motion of a defendant in any criminal case made prior to trial the court shall order the state to furnish the defendant with a copy of any written confession or admission and a list of the witnesses to its making. If the defendant has made an oral confession or admission a list of the witnesses to its making shall be furnished.
- (b) The list of witnesses may upon notice and motion be amended by the state prior to trial.
- (c) No such confession or admission shall be received in evidence which has not been furnished in compliance with subsection (a) of this section unless the court is satisfied that the prosecutor was unaware of the existence of such confession or admission prior to trial and that he could not have become aware of such in the exercise of due diligence.

History: En. 95-1804 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-10.

- 95-1805. Motion to suppress confession or admission. (a) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was not voluntary.
- (b) The motion shall be made before the trial unless for good cause shown the court shall otherwise direct.
- (c) The defendant shall give at least ten (10) days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.
- (d) The motion shall be in writing and state facts showing wherein the confession or admission was involuntary.
- (e) If the allegations of the motion state facts which if true, show that the confession or admission was not voluntarily made the court shall conduct a hearing into the merits of the motion.
- (f) The burden of proving that a confession or admission was involuntary shall be on the defendant.
- (g) The issue of the admissibility of the confession or admission shall not be submitted to the jury. If the confession or admission is determined to be admissible the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.
- (h) If the motion is granted the confession or admission shall not be admissible in evidence against the movant at the trial of the case.

History: En. 95-1805 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides for the suppression of an involuntary confession or admission. The determination of when a confession or admission is voluntary is to be made on a case-by-case method. The

truth or falsity of a confession is not to be considered in determining its voluntariness.

The procedure to be followed requires the court to hold a complete evidentiary hearing regarding the confession outside the presence of the jury. The court must then make a determination whether the purported confession was voluntary or involuntary. If the confession is found to be voluntary it may be admitted for consideration by the jury. This procedure must be followed whenever the voluntariness of a confession is put in issue.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-11.

Test of Voluntariness

Before admitting a confession into evidence, it is necessary to determine whether it was made voluntarily and of defendant's

free will; fact that a sedative was administered to defendant within an hour before his first confession did not, ipso facto, make it inadmissible. State v. Noble, 142 M 284, 384 P 2d 504.

Truth or falsity of a confession is not to be considered in determining its voluntariness; before a confession may be admitted into evidence, the state must show to satisfaction of trial court that it was voluntary. State v. White, 146 M 226, 405 P 2d 761.

- 95-1806. Motion to suppress evidence illegally seized. (a) A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything so obtained.
- (b) The motion shall be made before trial unless for good cause shown the court shall otherwise direct.
- (c) The defendant shall give at least ten (10) days' notice of such motion to the attorney prosecuting or such other time as the court may direct. The defendant shall serve a copy of the notice and motion upon the attorney prosecuting.
- (d) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful.
- (e) If the allegations of the motion state facts which if true show that the search and seizure were unlawful the court shall conduct a hearing into the merits of the motion.
- (f) The burden of proving that the search and seizure were unlawful shall be on the defendant.
- (g) If the motion is granted the evidence shall not be admissible against the movant at any trial of the case.

History: En. 95-1806 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section provides the machinery for enforcing the constitutional protection against illegal searches and seizures. The motion must be made before trial. However, if the grounds for the motion were unknown to the defendant he may make it later.

The procedure for an appeal from a motion to suppress is provided for in Chapter 24. A defendant cannot appeal from a ruling on a motion to suppress until after final judgment.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-12.

Cross-References

Unreasonable searches and seizures prohibited, Mont. Const. Art. III, § 7.

Timeliness of Motion

If accused has had opportunity to suppress illegally obtained evidence before trial and fails to do so, objection to the evidence at trial will not avail him; where accused knew from time information was filed on May 7 that state was accusing him of illegally transporting liquor on basis of an earlier search and seizure and knew that state could not make a prima facie case against him without the evidence obtained by that search and seizure but did not take any action to suppress the evidence until trial on April 11 of following year, his objection was not timely and admission of the evidence was not error even if it had been obtained in violation of accused's constitutional rights. State v. Gotta, 71 M 288, 229 P 405.

Law Review

Procedure for Suppressing Illegally Seized Evidence, 20 Mont. L. Rev. 225 (1959).

CHAPTER 19

TRIAL IN DISTRICT COURT

Section 95-1901. Method of trial. 95-1902. Plea of guilty. 95-1903. Failure of the county attorney to attend. 95-1904. Presence of defendant-mistrial for absence. 95-1905. Formation of trial jury. 95-1906. Order of prosecutions. 95-1907. Time to prepare for trial. 95-1908. Motion to discharge jury panel. 95-1909. Trial jurors. 95-1910. Order of trial. 95-1911. When order of trial may be departed from. 95-1912. View of place of offense or property. Conduct of jury after submission of case. 95-1913. 95-1914. Court may adjourn during absence, but deemed open. 95-1915. 95-1916. Defendant, when to be discharged.

- 95-1901. Method of trial. (a) All prosecutions except on a plea of guilty, deciding issues of fact shall be tried by the court and jury.
- (b) Questions of law shall be decided by the court and questions of fact by the jury except on a trial for libel the jury shall determine both questions of law and of fact.
- (c) Defendants in all criminal cases shall have a right to trial by jury not to exceed twelve (12) in number. However, if no capital offense is involved, the parties may agree in writing, at any time before the verdict, with the approval of the court that the jury shall consist of any number less than twelve (12).
- (d) The plea of not guilty puts in issue every material allegation of the indictment, information or complaint.

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-7002, 94-7235, 94-7236 and 94-6804; Montana constitution, article III, section 10.

Cross-References

Jury decides questions of law and fact in suits for libel, Mont. Const. Art. III, 810.

Right of trial by jury, Mont. Const. Art. III, § 23.

Directed Verdict in Criminal Case

In a prosecution for unlawfully driving a truck with an overload which is a misdemeanor, it was error for the court to instruct and direct the jury to return a verdict of guilty where the evidence as to the truc weight of the truck was in conflict as shown by two different state police scales. State v. Baillargeron, 126 M 310, 249 P 2d 799, 801.

Double Jeopardy Question of Fact

The pleas of former acquittal and once in jeopardy involve an issue of fact, and

cannot be determined without a finding by a jury. State v. O'Brien, 19 M 6, 47 P 103.

Former Jeopardy

The mere pendency of a prior information does not sustain the plea of former jeopardy; where there are two informations pending charging the same offense, until there has been a trial or defendant is placed in jeopardy under one information, the plea of former jeopardy is not available as against the other. State v. Aus, 105 M 82, 86, 69 P 2d 584.

Jury of Twelve

Conviction of first degree murder by jury of eleven violated constitution and was a nullity even though defendant consented to jury of eleven when one juror was excused during trial because of sickness in his family. Territory v. Ah Wah, 4 M 149, 1 P 732.

New Trial Not Double Jeopardy

In a prosecution for the larceny of one of four colts, all stolen at the same time and place, defendant was convicted and served about a month in the state prison when a new trial was granted him for want of proper proof of ownership of the colt. Thereupon a new information was filed charging the theft of one of the other three colts, and defendant interposed a plea of once in jeopardy, which was properly denied, not because of a different offense, theft of four colts at the same time constituting but one offense, but because in the granting of a new trial he is in the same jeopardy. State v. Aus, 105 M 82, 86, 69 P 2d 584.

Where one convicted of crime is granted a new trial he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had. State v. Aus, 105 M 82, 86, 69

P 2d 584.

Plea of Not Guilty

The plea of not guilty of the offense charged in the information puts in issue allegations of prior convictions, as well as the other allegations therein contained, and there is no merit in the contention that defendant, never having pleaded to the charge of prior convictions, no issue was raised as to that allegation. State v. Gordon, 35 M 458, 464, 90 P 173.

Gordon, 35 M 458, 464, 90 P 173.

The bar to a prosecution for misdemeanor where defendant is not brought to trial within time allowed may properly be raised by a plea of not guilty. State v. Porter, 130 M 299, 300 P 2d 952, 954.

Test for Determination of Former Jeopardy

The test to be applied in determining whether, in a criminal prosecution, the plea of former jeopardy should be sustained is whether the matter set out in the second information was admissible as evidence and would have sustained a conviction under the first information. Held, that a second information filed charging defendant with embezzlement of city funds, dismissed, and that it was error to refuse to entertain defendant's plea. State v. Parmenter, 112 M 312, 315, 116 P 2d 879.

Waiver of Jury Trial

Under constitution, one charged with felony cannot waive jury trial in favor of one by court; however, he may waive trial entirely by pleading guilty. State v. Scalise, 131 M 238, 309 P 2d 1010.

When Only One Transaction Rule Applicable

The rule that there is but one larceny if several articles are stolen at different times and from different places under a single design, impulse or purpose, is applicable only if the different subjects involved are so related in point of time and location as to make it physically possible for actual control to be exercised over both at the same time. Held, that the taking of a bunch of horses a mile east of a ranch, and another bunch three quarters of a mile south, though corralled at the same place, but belonging to different persons, were independent offenses. State v. Akers, 106 M 105, 107, 109, 76 P 2d 638.

Where Conviction Set Aside

One whose conviction has been set aside may be tried anew on the same or another information for the same offense of which he was convicted. State v. Aus, 105 M 82, 86, 69 P 2d 584.

Where Jury Disregards the Law

The jury have the power to disregard the law as declared and acquit defendant, however convincing the evidence may be, and the court has no power to punish them for such conduct. State v. Koch, 33 M 490, 497, 85 P 272.

Collateral References

Criminal Law 300, 734, 737 (1); Jury 4; Libel and Slander 158.

22 C.J.S. Criminal Law §§ 451-454; 23 C.J.S. Criminal Law § 1118 et seq.; 50 C.J.S. Juries § 7; 53 C.J.S. Libel and Slander § 301.

21 Am. Jur. 2d 462, Criminal Law, § 467; 53 Am. Jur. 141 et seq., Trial, § 156

et seq.

95-1902. Plea of guilty. Before or during trial a plea of guilty may be accepted when:

(a) the defendant enters a plea of guilty in open court; and

(b) the court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

At any time before or after judgment the court may for good cause shown permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

History: En. 95-1902 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The burden is placed on the defendant to show by affidavits or by oral testimony that withdrawal of his plea should be allowed. A change of plea should ordinarily be permitted if it fairly appears that the defendant was ignorant of his rights or of the consequences of his act, was influenced improperly or if it appears that the plea was entered under some mistake or misapprehension. In determining if sufficient showing has been made, a factor that should be given substantial consideration is whether the defendant appeared without counsel at the time of the plea.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 115-2; Revised Codes of Montana 1947, section 94-6803.

Circumstances Under Which Motion To Change Plea Granted

Defendant, a Mexican without education and unfamiliar with court procedure, stood charged with murder in the first degree. When he asked for a jury trial his first attorney asked to be relieved of his assignment; the second advised defendant to plead guilty and take a life sentence, whereas if he were tried by jury the sentence would be one of death. Defendant's plea was guilty, and the court imposed the death sentence. Held, that trial court abused its discretion in refusing to grant defendant's motion for permission to change his plea to one of not guilty. State v. Casaras, 104 M 404, 413, 66 P 2d 774.

Denial of Motion To Withdraw

Denial of motion to withdraw plea of guilty will not be reversed where chief contention was that he was misled by the erroneous advice of counsel as to his guilt under the law, when from the record there was evidence which would have justified a finding of guilty, regardless of the correctness of the counsel's interpretation of the law. State v. Nance, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

Discretion of Court

The granting or refusal of permission to withdraw a plea of guilty and substitute a plea of not guilty rests in the discretion of the trial court and is subject to review only where an abuse of discretion is shown. State v. Nance, 120 M 152, 184 P 2d 554, 560, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

Guilty Plea Under Agreement with Prosecutor

While the supreme court will not encourage the making of bargains with persons charged of crime, where a defendant has changed his plea of not guilty to a plea of guilty on an agreement with the prosecuting attorney as to recommendation for sentences which were carried out,

the supreme court, will not, after he obtained the benefits of the agreement, aid him in escaping its obligations, by ordering a withdrawal of the guilty plea. State v. Nance, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

In Cases of Doubt That Plea Voluntary, Application To Change Plea Should Be Granted

On hearing of an application of defendant, accused of crime, for permission to change his plea of guilty to not guilty, any doubt that the first plea was not voluntary should be resolved in his favor and in favor of a trial on the merits; plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, persuasion, promise or ignorance. State v. Casaras, 104 M 404, 413, 66 P 2d 774.

Motion To Withdraw-Time for Filing

In order to receive favorable consideration, an application to withdraw a plea of guilty should be made within a reasonable time. State v. Nance, 120 M 152, 184 P 2d 554, 561, distinguished in 121 M 459, 479, 194 P 2d 651, 662.

Waiver of Jury Trial

The entering of a plea of guilty by a defendant waives his right to a jury trial. State v. Peters, 140 M 162, 369 P 2d 418, 419.

When Plea of Guilty May Be Withdrawn After Judgment

Although former section provided that the district court at any time before judgment might permit a plea of guilty to be withdrawn and a plea of not guilty to be substituted, the court was not prohibited by statute from permitting this to be done after judgment; the power to permit the latter was inherent and might be exercised in the court's discretion to rectify an injustice, especially where occasioned through ignorance or lack of understanding of the gravity of the offense charged against the petitioner and its discretion in that behalf might not be disturbed on appeal except on a showing of abuse. State ex rel. Foot v. District Court, 81 M 495, 501, 263 P 979.

Where the evidence discloses that there was a grave doubt that the defendant had the mental capacity to appreciate and understand what he was doing and the consequences thereof, when, without benefit of counsel, he pleaded guilty to the charge of murder, defendant should have been allowed to withdraw his plea of guilty and enter a plea of not guilty. State v. Dryman, 125 M 500, 241 P 2d 821, distin-

guished in 131 M 152, 156, 308 P 2d 969, 971

Held, on the facts of the particular case, that where the defendant at the time of entering his plea of guilty thought that he had an understanding as to what his sentence would be; that no direct commitment was made to him by any of the officers but the officers had made statements to others who were in contact with the defendant and upon whose advice he relied, the ends of justice would be best served by permitting the defendant to change his plea. State v. Morgan, 131 M 58, 307 P 2d 244, distinguished in 134 M 301, 304, 330 P 2d 968, 970.

District court did not abuse its discretion in entering order denying defendant's motion to withdraw plea of guilty and substitute plea of not guilty where the record disclosed that defendant entered his plea of "guilty" on December 30, 1960; sentence was pronounced on January 23,

1961; and the motion was not filed in the district court until July 24, 1961, six months after imposition of the sentence and six months and twenty-four days after entry of the plea. State v. Peters, 140 M 162, 369 P 2d 418, 419.

Written "Special Plea in Bar" Not Authorized

Justice of the peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written special plea in bar and ordering the defendant to answer to the complaint. State ex rel. Borberg v. District Court, 125 M 481, 240 P 2d 854, 857, 861.

Collateral References

Criminal Law 273, 274, 300. 22 C.J.S. Criminal Law \$422 et seq. 21 Am. Jur. 2d, Criminal Law, p. 476-483, §§ 484-495; p. 495-498, §§ 504-506.

95-1903. Failure of the county attorney to attend. If the county attorney fails to attend the trial, the court may appoint some attorney at law to perform his duties.

History: En. 95-1903 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7239.

Attorney's Compensation

An attorney appointed to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth. State ex rel. McGrade v. District Court, 52 M 371, 374, 375, 157 P 1157.

Court's Power

The district court is vested with the power of appointment of some attorney in any criminal case when the emergency contemplated by this section arises, and of removal, where a disqualification of the attorney appointed appears, and while the court will usually choose someone from among the local attorneys, it is not required to do so. State ex rel. McGrade v. District Court, 52 M 371, 374, 375, 157 P 1157.

Collateral References

Criminal Law 639 (2); District and Prosecuting Attorneys 3.
27 C.J.S. District and Prosecuting Attorneys § 28.

- 95-1904. Presence of defendant—mistrial for absence. (a) The defendant must be personally present at the trial and rendition of judgment in all cases tried in the district court. If the defendant fails to appear at any time during the course of the trial and before the jury has retired for its deliberations or the case has been finally submitted to the judge, and if after the exercise of reasonable diligence, his presence cannot be procured, the court shall declare a mistrial and the cause may again be tried.
- (b) In all cases appealed to the supreme court it shall be conclusively deemed that the defendant was present in court at all stages of the trial unless the record on appeal affirmatively shows to the contrary; in all cases appealed to the supreme court it shall be conclusively deemed that the court or judge gave the proper admonition in accordance with the pro-

vision of section 95-1913 (e) unless the record affirmatively shows to the contrary.

History: En. 95-1904 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

When a defendant voluntarily absents himself from the court after proceedings have been commenced and as a result, makes it impossible for the jury to render a valid verdict, the defendant waives his right to plead double jeopardy and the cause can be tried again. The record should indicate the defendant's presence, but if not, there is a presumption he was present.

The settlement of instructions is no part of the "trial" within the meaning of this section. The right of a defendant to be present when the triers of fact are absent is not an absolute right, but one qualified by a condition that nothing occurs when he is not present which could put him in jeopardy.

Cross-References

Right to appear and defend in person, Mont. Const. Art. III, § 16.

Clerk's Minutes Sufficient Showing

Clerk's minutes, in a prosecution for felony, construed on appeal to show that the defendant was present in court when the verdict was returned. State v. Hall, 55 M 182, 187, 175 P 267.

Conclusive Presumptions

One convicted of crime may not assert prejudicial error on the ground that the record on appeal fails to disclose that he was present at the time the verdict was returned, unless the record affirmatively shows the contrary, otherwise it must be conclusively deemed that he was present in court at all stages of the trial. State v. Cates, 97 M 173, 197, 33 P 2d 578.

Court May Vacate and Repronounce Sentence

Where the trial court pronounced sentence against defendant convicted of second degree assault while defendant was absent, it was not error for the court, on its own motion, to vacate the sentence and repronounce the same sentence two days later in the presence of the defendant and his attorney. State v. Porter, 143 M 528, 391 P 2d 704.

Motion for New Trial

This section and section 16, article III of the Montana constitution do not require that the defendant be present at a hearing on a motion for a new trial because such a hearing is held after the

verdict has been rendered and is not part of the trial. State v. Peters, 146 M 188, 405 P 2d 642.

Presence of Defendant

While the fact that the defendant in a criminal cause was present when the verdict was received must affirmatively appear, minutes which show his presence during the trial up to the time the jury retired, and then recite that "defendant thereupon waived the polling of the jury," and "defendant thereupon waives time for sentence and elects to be sentenced at this time," sufficiently meet this requirement. State v. De Lea, 36 M 531, 534, 93 P 814.

Right Cannot Be Waived

One charged with crime cannot waive his right to be present at his trial. State v. Reed, 65 M 51, 55, 56, 210 P 756.

Right To Be Present

A defendant's constitutional and statutory right to be present at his trial does not encompass proceedings before the court involving matters of law. Such rights are violated only if the defendant is prevented from being personally present when jury is hearing his cause or is prevented from attending such other proceedings where his presence is essential to a fair and just determination of a substantial issue. State v. Peters, 146 M 188, 405 P 2d 642.

Showing Necessary

It must affirmatively appear that one charged with a felony was present when the verdict was received; but this may be shown by every fair intendment of the record. State v. De Lea, 36 M 531, 537, 93 P 814.

Under the constitutional and statutory provisions applicable, a defendant charged with crime must be present throughout the entire trial, including the rendition of the verdict, and the fact of his presence must be made to appear from the record. State v. Reed, 65 M 51, 55, 56, 210 P 756.

Minutes of the trial court in a capital

Minutes of the trial court in a capital case examined and held not to show even by reasonable inference that defendant or his counsel was present during the trial of the cause, in disregard of the statutory provisions entitling defendant to a reversal of the judgment. State v. Reed, 65 M 51, 55, 56, 210 P 2d 756.

What Is Not Considered Part of the Trial

The settlement of instructions being no part of the "trial," within the meaning of former section, the absence of one

charged with felony during such settlement does not constitute reversible error. State v. Hall, 55 M 182, 187, 175 P 267.
Predecessor section required the personal

presence of the defendant at the trial in felony cases. After the jury had retired to the jury room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes and other articles found in defendant's room, be sent to them. While defendant was not present in the courtroom, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by statute to be taken to the jury room. State v. Olson, 87 M 389, 395, 287 P 938.

Collateral References

Criminal Law 536.

23 C.J.S. Criminal Law § 973, 974; 24 C.J.S. Criminal Law § 1574; 24A C.J.S. Criminal Law § 1854.

21 Am. Jur. 2d, Criminal Law, p. 305 et seq., § 271 et seq.; p. 318 et seq., § 288 et seq.; p. 330, §§ 304, 305; p. 511, § 528; 53 Am. Jur. 707, Trial, §§ 1024, 1025.

Amending verdict to correct defect of absence of defendant, right to re-assemble jury for purpose of. 66 ALR 559.

Voluntary brief absence of defendant from courtroom during trial of criminal case as ground of error. 100 ALR 478.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 144 ALR 199 and 85 ALR 2d 1111.

Personal presence of defendant and his counsel as necessary to the validity of discharge of jury in criminal case before reaching verdict. 150 ALR 764.

Voluntary absence of accused when sentence is pronounced. 6 ALR 2d 997.

Absence of accused at return of verdict in felony case. 23 ALR 2d 456.

Jury, impaneling or selection of, in accused's absence. 26 ALR 2d 762.

Right of accused to be present at polling of jury. 49 ALR 2d 640.

95-1905. Formation of trial jury. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions, except that the total number of jurors drawn shall be at least twelve (12) plus the total number of peremptory challenges.

History: En. 95-1905 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The trial jury shall be selected in the same manner as juries in civil cases, and the appropriate statutes for civil law trial jury formation are applicable.

Operation and Effect

A jury panel in a criminal case must be drawn in substantial conformity with the requirements of the code relating to trial ments in their essential particulars are 223, 74 P 418.

95-1906. Order of prosecutions. Prosecutions against defendants held in custody must be disposed of in advance of prosecution against defendants on bail unless for good cause the court shall direct an action to be tried out of its order.

History: En. 95-1906 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The clerk should keep a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment or information, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.

Source: Revised Codes of Montana 1947, section 94-7007.

juries in civil actions, and those requiremandatory. State v. Landry, 29 M 218,

Control of Docket

Former section requiring the clerk of the district court to keep a calendar of criminal actions enumerated according to the date of filing the information; former section declaring that the calendar must be disposed of in the order therein named unless the court shall direct otherwise, and former section 94-7013, providing that if a case is not postponed it must be set for hearing in the order in which it appears on the calendar, unless by consent it is set down for trial out of its order, are di-rectory only, the district court having power to control its docket and the order in which it may try cases. State v. Quinlan, 84 M 364, 369, 275 P 750.

Collateral References

Criminal Law 573, 632. 22A C.J.S. Criminal Law § 467; 23 C.J.S. Criminal Law § 929. Remedy for delay in bringing accused to trial. 58 ALR 1510.

Waiver or loss of defendant's right to speedy trial in criminal case. 129 ALR 572 and 57 ALR 2d 302.

95-1907. Time to prepare for trial. After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

History: En. 95-1907 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

What is a reasonable time to prepare for trial is left to the discretion of the judge.

Source: Revised Codes of Montana 1947, section 94-7008.

Continuance

Trial judge did not abuse discretion in denying defendant's application for continuance over the term where trial was set for May 7, 1956, after defendant entered plea of guilty on April 24, 1956. State v. McLeod, 131 M 478, 311 P 2d 400, 407.

Nonprejudice on Unnecessary Amendment and Rearraignment under Notice

Where original information on attempt to commit arson sufficient, to which defendant pleaded not guilty, but county attorney, after giving defendant ten days'

notice of proposed amendment was permitted on day of trial to amend showing manner and means of the attempt, whereupon defendant was unnecessarily rearraigned, the fact that he was not given two days in which to prepare trial after rearraignment under former statute could not have affected him prejudicially, in view of notice and unnecessary amendment. State v. Gaffney, 106 M 310, 312, 77 P 2d 398.

Time Allowed

Under former section the defendant was entitled to at least two days to prepare for trial; therefore where he had seven months from the day of entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard. State v. Showen, 60 M 474, 478, 199 P 917.

Collateral References

Criminal Law 577. 22A C.J.S. Criminal Law §§ 478, 479.

- 95-1908. Motion to discharge jury panel. (a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel. The motion shall be made at least five (5) days prior to the term for which the jury is drawn. For good cause shown, the court may entertain the motion at any time thereafter.
- (b) The motion shall be in writing supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn.
- (c) If the motion states facts which show that the jury panel has been improperly selected or drawn, it shall be the duty of the court to conduct a hearing. The burden of proof shall be on the movant.
- (d) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

History: En. 95-1908 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

A challenge to the panel can be founded only on a material departure from the law in respect to the drawing and return of the jury.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 114-3.

Burden of Proof

Where defendant's offer to submit a challenge to the panel on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied. State v. Jones, 32 M 442, 449, 80 P 1095.

Where accused interposed a challenge to the jury panel because the sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the state took an exception, the court erred in overruling the challenge on the ground that defendant had failed to sustain the burden of establishing the truth of his assertion, since by its exception, which was, in effect a demurrer, the facts stood admitted by the state, and no burden rested upon defendant. State v. Groom, 49 M 354, 358, 141 P 858.

Evidence, including testimony by sheriff that his failure to summon some of jurors was occasioned by his imperfect knowledge of county lines incident to creation of a new county, was sufficient to sustain challenge premised on sheriff's intentional omission to summon some of jurors drawn by jury commission. State v. Groom, 49 M 354, 358, 141 P 858.

Where two jurors did not appear and were not excused when the jury was impaneled but the defendant could not show affirmatively that the panel had not been served, there was no prejudicial error. State v. Moran, 142 M 423, 384 P 2d 777.

Effect of Demurrer to Challenge

In a criminal case, a demurrer to a challenge to the jury panel is equivalent to an exception to the challenge, the mere name not being important; and the action of the court in sustaining a demurrer to such challenge, and in impaneling the jury, amounted to a disallowance of the challenge, so as to render the question raised by the challenge reviewable on appeal. State v. Tighe, 27 M 327, 330, 71 P 3, overruled on other grounds in State v. Sherman, 35 M 512, 518, 90 P 981.

An exception to the challenge to a jury panel in a criminal case is, in effect, a demurrer, and admits all the facts stated to be true. State v. Groom, 49 M 354, 357, 141 P 858.

Only Material Departures Ground for Challenge

It is not every deviation from the strict letter of the law in drawing or returning a jury that will furnish ground for a challenge. The departure must be a material one. State v. Groom, 49 M 354, 359, 141 P 858.

Presumption That Jury Commissioners Performed Their Duty

Where defendant filed a verified, specific and detailed challenge to a jury panel and the county attorney did not deny the sufficiency of the facts alleged and the defendant also filed a timely motion for the issuance of a subpoena to the jury commissioners to appear, the trial court could not presume the jury commissioners had

performed their duty in selecting the panel; hence, it was error for the trial court to overrule defendant's motion based on the presumption that the jury commissioners had performed in accordance with the law. State v. Deeds, 130 M 503, 305 P 2d 321, 324.

Question of Fact

Where all parties treat a challenge to the panel as raising an issue of fact, the supreme court will treat the matter as though an issue had been raised by a denial of the challenge. State v. Groom, 49 M 354, 357, 141 P 858.

Right of Defendant

Failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. State v. Moran, 142 M 423, 384 P 2d 777.

Substantial Compliance Required

A substantial compliance with the law is required in the work of procuring a jury. Anything less will vitiate such work. State v. Landry, 29 M 218, 224, 74 P 418; State v. Groom, 49 M 354, 358, 141 P 858.

Trial of Facts Required

If a challenge to the panel alleges facts which, if true, would show a material variation from the statutory procedure in making up the jury list, the court could not, on the basis of a presumption that the jury commissioners had done their duty, summarily deny the challenge, particularly in the absence of an exception by the adverse party. State v. Chapman, 139 M 98, 360 P 2d 703.

Who May Testify

Query, whether a judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he orders such drawing and directs the clerk during its progress, both judicial and ministerial officers whose irregularity is complained of may be called upon to testify. State ex rel. Breen v. District Court, 34 M 107, 111, 85 P 870.

Collateral References

Criminal Law 867; Jury 115, 119, 121, 125.

23A C.J.S. Criminal Law §§ 1382-1385; 50 C.J.S. Juries §§ 247, 260-266. 47 Am. Jur. 2d 802-803, Jury, §§ 213-

47 Am. Jur. 2d 802-803, Jury, §§ 213-215; 53 Am. Jur. 681 et seq., Trial, § 970 et seq.

DECISIONS UNDER FORMER LAW

Lack of Jurisdiction

Former statute gave court express authority to discharge the jury, in a criminal case, if the opening statement of the county attorney affirmatively disclosed

that the offense charged was committed outside of the county in which the prosecution was being had. State v. Hall, 55 M 182, 185, 175 P 267.

- 95-1909. Trial jurors. (a) The clerk of court shall make available to the parties a list of prospective jurors with their addresses when drawn.
- (b) (1) The qualifications of jurors, and who will be exempted, are found in sections 93-1301 through 93-1307, of the Civil Code, which by reference are made a part of this code.
- (2) An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.
- (c) The county attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney or the prosecuting attorney if the court believes such examination to be improper.
- (d) (1) Each party may challenge jurors for cause, and each challenge must be tried by the court.
- (2) A challenge for cause may be taken for all or any of the following reasons; or for any other reason which the court determines:
 - (i) Consanguinity or relationship to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.
 - (ii) Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, debtor and creditor, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment.
 - (iii) Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.
 - (iv) Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.
 - (v) Having served on a trial jury which has tried another person for the offense charged.
 - (vi) Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside or which was discharged without verdict, after the case was submitted to it.
 - (vii) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
 - (viii) If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

- (ix) Having a belief that the punishment fixed by law is too severe for the offense charged.
- (x) For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party.
- (e) All challenges must be interposed before the jury is sworn, unless the cause of challenge be discovered after the jury is sworn and before the introduction of any evidence, when the court, in its discretion may allow the challenge to be interposed.
- (f) Each defendant shall be allowed eight (8) peremptory challenges in capital cases, six (6) in all other cases tried in the district court, and three (3) in all cases tried in justice of the peace or police courts. However, there may not be additional challenges for separate counts charged in the indictment or information. If the indictment or information charges a capital offense, as well as lesser offenses in separate counts, the maximum number of challenges shall be eight (8). The state shall be allowed the same number of peremptory challenges as all of the defendants.
- (g) After the jury is impaneled and sworn, the court may direct the selection of one or more alternate jurors, in the same manner as principal jurors, who shall take the same oath as the principal jurors. Each party shall have one additional peremptory challenge for each alternate juror. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its vedict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.
 - (h) The jury shall return a general verdict to each offense charged.
- (i) When, at the close of the state's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, the court may allow the case to be reopened for good cause shown.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The provision for address if known is for the convenience of both parties.

NOTE.—See sec. 93-1811 for provision for alternate jurors.

Constitutionality

Former statute providing, inter alia, that no juror should be disqualified by having formed or expressed an opinion on matter in question, founded upon public rumor, statements in public journals or common notoriety if he would nevertheless act im-

partially and fairly upon matter submitted to him was constitutional. Territory v. Bryson, 9 M 32, 39, 22 P 147; State v. Sheerin, 12 M 539, 541, 31 P 543; State v. Martin, 29 M 273, 277, 74 P 725; State v. Mott, 29 M 292, 306, 74 P 728.

Causes Enumerated Not Exclusive

The constitutional provision (section 16, article III) that one accused of crime shall have the right to trial by an impartial jury is a limitation upon the power of the legislature and it is beyond its power to curtail it; hence, where it clearly appeared from the examination of a juror on his voir dire that some circumstance or con-

nection with the case rendered him unfit to serve, he should have been disqualified even though the cause did not fall within any of those specified in former statute. State v. Russell, 73 M 240, 244, 235 P 712.

Challenges for Cause

Where the state challenged three jurors for cause, and the evidence showed that one of the jurors was nearly deaf, and the other two had formed opinions, the court was correct in excusing the jurors for cause. State v. Gates, 131 M 78, 307 P 2d 248.

Challenges, How Taken-Waiver

Where the state waived its fourth peremptory challenge, and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; the state's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. State v. Peel, 23 M 358, 363, 59 P 169.

Directing Jury To Acquit Defendant

Where there is an utter failure or lack of evidence to establish the state's case court may direct the jury to return a verdict for the defendant. State v. Widdicombe, 130 M 325, 301 P 2d 1116, 1118.

Duty of Attorneys To Advise Court That Coroner's Juror Serving as Trial Juror

Where voir dire examination of trial juror in murder case failed to reveal that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty of both to advise the trial court at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. State v. Allison, 116 M 352, 364, 153 P 2d 141.

Effect of Juror Admitting Bias

Where a juror in a criminal case on examination first admits bias in favor of defendant, but later states that notwithstanding such bias he can consider the evidence impartially, the latter statement should be received with caution. State v. Huffman, 89 M 194, 197, 296 P 789.

Juror Bias

"A juror is not incompetent because he has previously served upon the trial of another defendant charged with a separate and distinct offense, although of the same

character, and proved by the same witness or witnesses." State v. Russell, 73 M 240, 244, 235 P 712.

Where one had served as a juror in a prosecution for rape he was not disqualified, as for actual bias, from serving in the same capacity in a later case of the same character against another defendant in which the prosecutrix was the same as in the first, by the fact that on the former trial evidence of the guilt of the latter defendant had been introduced. State v. Russell, 73 M 240, 244, 235 P 712.

Juror's Prejudice

A juror who testified on his voir dire examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error. State v. Brooks, 57 M 480, 188 P 942.

Juror with an Opinion Based on Newspaper Story or Hearsay

A juror who has formed and expressed an opinion on the case from reading newspaper statements and from hearsay, but who states that he does not know the defendant, has no prejudice, and, notwithstanding such opinion, can impartially try the case, is competent. State v. Sheerin, 12 M 539, 541, 31 P 543.

Where a venireman in a criminal case stated on his voir dire that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent as a juror. State v. Howard, 30 M 518, 523, 77 P 50.

General challenges of jurors "for the purposes of the record" who, while stating on their voir dire that they had read the newspaper account of the killing of deceased and were of the opinion at the time that he had been murdered, did not state that they had any belief that defendant had committed the crime, but did say that they would follow the instructions of the court and render an impartial verdict, were properly denied. State v. Byrne, 60 M 317, 328, 199 P 262.

A juror who on his voir dire stated that he had read in the newspapers an account of the homicide for which plaintiff was on trial; that he had formed an opinion therefrom which it would take evidence to remove, but that in determining the case he would base his verdict upon the evidence and be bound by the court's instructions; that there was nothing known to him which would prevent his trying the case fairly, etc., held competent. State v. Juhrey, 61 M 413, 202 P 762.

Where a juror on his voir dire stated that from newspaper reports and conversations with others he had formed the opinion that murder had been committed, but had no opinion as to the guilt or innocence of the defendant, that he would require the state to prove beyond a reasonable doubt that the latter had killed deceased with malice aforethought before he would vote for a conviction, and that he could fairly and impartially try him, he was not disqualified from serving. State v. Vettere, 76 M 574, 585, 586, 248 P 179.

Where a juror on his voir dire in a homicide case first stated that he had formed an opinion based on talks with others and on newspaper accounts, but later upon being questioned by the court replied that he could give a fair and impartial verdict despite his opinion and that his opinion was based only on rumor, denial of defendant's challenge for cause was not error. State v. Simpson, 109 M 198, 206, 95 P 2d 761, overruled on other grounds in State v. Knox, 119 M 449, 453, 175 P 2d 774.

Where a juror on his voir dire in a burglary case stated that he had formed an opinion based on what he had heard on the radio, television, and read in the newspapers, but had not discussed the case with anyone purporting to know any of the facts about it and declared under oath that he could lay aside his opinion and judge the case solely on the evidence presented, it was not error to deny defendant's challenge. State v. Moran, 142 M 423, 384 P 2d 777.

In a criminal prosecution, a prospective juror who had formed an opinion of the case based on a newspaper account of the act but who declared under oath that he could consider the evidence impartially was competent to serve as a juror under a statute providing a challenge for cause for actual bias and under statute providing that no person shall be disqualified as a juror for having formed an opinion based on statements in public journals. State v. White, 151 M 151, 440 P 2d 269.

Nature of Right To Challenge

The right to challenge is the right to reject, not to select, a juror, and no person can acquire a vested right to have any particular member of a panel sit upon his case until such member has been accepted and sworn. State v. Huffman, 89 M 194, 197, 296 P 789.

Newspaperman's Bias

After conviction of first degree murder, defendant moved for new trial on ground, among others, that a juror had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of defendant, he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in apprehending the "murderer" whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind," etc. The motion was denied. Held, in answer to the contention that the court abused its discre-tion in denying it, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements of the juror on his examination touching his competency as well as on the hearing of the motion, that the court did not err in its ruling. State v. Hoffman, 94 M 573, 586, 23 P 2d 972. See also State v. Huffman, 89 M 194, 197, 296 P 789.

Number of Peremptory Challenges

In a prosecution for murder, the accused was properly compelled to exhaust alternately two peremptory challenges to each one taken by the state, where none were taken until the panel was full. State v. Sloan, 22 M 293, 298, 56 P 364.

Overruling Challenge

Where court relied on answers to last two questions and on the assumption that there was a misunderstanding as to the earlier questions in examining a prospective juror for prejudice, the overruling of the challenge would not be disturbed especially where the defendant had three peremptory challenges left at the time and exercised one to discharge such juror and fact that defendant regarded other jurors as undesirable on which he might have exercised his challenge gave him no right to have such juror excused for bias where there was no showing that such jurors were disqualified. State v. Allison, 122 M 120, 199 P 2d 279, 286.

Prosecutor's Brother-in-Law Not Disqualified

A juror who, upon examination, has shown no bias, either implied or actual, is not disqualified by reason of being a brother-in-law of the prosecuting attorney. State v. Cadotte, 17 M 315, 316, 42 P 857.

Showing Necessary for New Trial

After verdict, the accused must make it appear affirmatively that he is entitled to a new trial because he has been deprived of his constitutional right to an impartial jury, and the probability that one juror was incompetent is not sufficient to set aside the verdict. In the absence of a clear showing of an abuse of discretion by the trial court in passing on a motion for a new trial, based on the alleged incompetency of a juror, the supreme court will not interfere. State v. Mott, 29 M 292, 307, 74 P 728.

Summoning Jury by Interested Sheriff

The facts that the victim of a homicide was a deputy sheriff, and that the sheriff was a witness for the state, did not disqualify the latter or his deputies from summoning the jury on the theory that they were interested in the outcome of the prosecution; if they were disqualified, the remedy of defendant was to object to the panel before sworn. State v. Heaston, 109 M 303, 314, 97 P 2d 330.

When Trial Judge Should Sustain Challenge

On the voir dire examination of a prospective juror the trial court is the judge of the weight to be given to his testimony, and if it has any doubt as to the existence of such a state of mind in a juror as would disqualify him, it should sustain a challenge to him in the interest of justice. State v. Huffman, 89 M 194, 197, 296 P 789.

Collateral References

Jury \$\infty 125, 135, 148 (4).

50 C.J.S. Juries §§ 215 et seq., 247 et

seq.
47 Am. Jur. 2d, p. 803, § 215; p. 822, § 233; p. 842, § 265; p. 844, § 267.

Contributing to fund for prosecution as

disqualifying juror. 1 ALR 519.

Prosecutor or witness for prosecution, relationship to, as disqualifying juror in criminal case. 18 ALR 375.

Substitution of juror after completion of panel as sustaining plea of double jeopardy. 28 ALR 849 and 33 ALR 142.

Unfamiliarity with English as affecting competency of juror. 34 ALR 194.

Illness or death of member of juror's family as justification for declaring mis-trial and discharging jury in criminal case. 53 ALR 1062.

Relationship to one financially affected by offense charged as disqualifying juror. 63 ALR 183.

Statutory grounds for challenge of jurors for cause as exclusive of common-law grounds. 64 ALR 645.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant. 96 ALR 508.

Dissolution of marriage as affecting disqualifying relationship by affinity in case of juror. 117 ALR 800.

Intelligence or character test of qualification of juror. 126 ALR 507.

Criminal charge or conviction as disqualifying juror. 126 ALR 518.

Removal by executive of disqualification

resulting from conviction of crime as applicable in case of conviction in federal court or court of another state. 135 ALR

Number of peremptory challenges allowable where two or more parties are on same side. 136 ALR 417.

Police officers or other law enforcement officers as jurors in criminal cases. 140 ALR 1183.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as binding upon disqualification to sit on jury. 175 ALR 805.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR 2d 1291.

Criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant, juror's presence at or participation in trial of. 6 ALR 2d 519.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction. 9 ALR

Failure of juror in criminal case to disclose his previous jury service within disqualifying period as ground for reversal. 13 ALR 2d 1482.

Deafness as ground for impeaching verdict. 15 ALR 2d 534.

Beliefs regarding capital punishment as disqualifying juror in capital case for cause. 48 ALR 2d 560.

Racial, religious, economic, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal case, 54 ALR 2d 1204.

Indoctrination by court of persons summoned for jury service. 89 ALR 2d 197.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR 2d 7.

Religious belief as ground for exemption or excuse from jury service. 2 ALR 3d 1392.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. 11 ALR 3d 859.

DECISIONS UNDER FORMER LAW

Advising Acquittal

Under former statute, if a trial judge was of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it was his duty to advise the jury to return a verdict of not guilty. State

v. Fisher, 23 M 540, 555, 59 P 919. Former section permitting court to advise jury to acquit the accused but not binding jury by such advice was applicable to those cases only in which the trial court deemed the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction. State v. Mahoney, 24 M 281, 286, 61 P 647. Under former statute, trial court could

not direct verdict in favor of defendant, being authorized to do no more, when it deemed the evidence insufficient to warrant conviction, than to advise the jury to acquit. State v. Collins, 88 M 514, 523, 294 P 957; State v. Wong Sun, 114 M 185, 192, 133 P 2d 761.

By former section, the trial court was prohibited from directing a verdict in any criminal case; if the advice was disregarded by the jury, the remedy was by granting a new trial. State v. Thierfelder, 114 M 104, 111, 132 P 2d 1035, overruled in State v. Labbitt, 117 M 26, 35, 156 P 2d

Where there was an utter failure of proof as to one or more of the essential elements of the offense charged, the trial court had the duty to order the jury to return a verdict of not guilty, but where there was evidence tending to prove every element necessary to constitute the offense charged but such evidence was insufficient in weight to warrant a conviction, the court could advise the jury to acquit but the jury was not bound by the advice. State v. Labbitt, 117 M 26, 35, 156 P 2d

Former section permitting trial court to advise jury to acquit defendant was applicable only in cases in which the trial court deemed the evidence, although tending to prove every element constituting the crime charged, insufficient in weight to warrant a conviction. State v. Peschon, 131 M 330, 310 P 2d 591, 595.

Cause for Challenge Must Be Alleged

Former provision that in challenging a juror for implied bias one or more of the statutory causes and in challenging for actual bias the cause stated in certain subdivision must be alleged, was mandatory; hence where that was not done, denial of the challenge did not entitle appellant to allege error. State v. Vettere, 76 M 574, 584, 248 P 179.

Challenges, How Taken-Waiver

Where either party fails to challenge in his turn, he is deemed to waive the challenge or challenges he might use at that time, but this rule goes no further than is necessary to preserve the alternation required by former statute. State v. Peel, 23 M 358, 362, 59 P 169. See also Chenoweth v. Great Northern Ry. Co., 50 M 481, 485, 148 P 330.

Motion for Nonsuit Not Proper Practice

In a criminal case motions for nonsuit are not proper to raise the question of the sufficiency of the evidence to warrant conviction, the proper practice being pre-scribed by former section, authorizing the trial court to advise the jury to acquit if it deemed the evidence insufficient. State v. DeTonancour, 112 M 94, 98, 112 P 2d 1065.

Number of Peremptory Challenges

Under former statute allowing eight peremptory challenges for offense punishable by imprisonment in state prison for not less than a specified number of years and six challenges for other offenses punishable by imprisonment in state prison, defendant, on trial for grand larceny aggravated by a prior conviction of the same offense, was entitled to eight—not six—peremptory challenges. State v. Collins, 53 M 213, 163 P 102.

Purpose

The purpose of former section governing how causes of challenge were to be stated was to require the ground of challenge to be stated before the challenger is in a position to predicate error on the court's refusal to sustain a challenge. It was not intended as a limitation upon the power of the court in granting challenges which the facts warrant. State v. Gates, 131 M 78, 307 P 2d 248, 249.

- 95-1910. Order of trial. (a) The court may instruct the jury as to its duties. Such general instructions must be settled in the same manner as provided for the settlement of special instructions in subsection (d) of this section.
- The county attorney must state the case and offer evidence in support of the prosecution. The defendant may make his opening state-

ment prior to the state's offer of evidence, or may state his defense and then offer evidence in support thereof after the state rests.

- (c) The parties may then respectively offer rebutting testimony only, unless the court, for good cause, permits them to offer evidence upon their original case.
- When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party, or his attorney, and delivered to the court. The instructions shall be settled by the court, without the presence of the jury, at which settlement counsel for the parties, or the defendant if he is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and proposed to be given by the court, and to present and argue to the court objections to the adoption or rejection of any instruction offered by counsel or proposed to be given to the jury by the court. On such settlement of instructions, the respective counsel, or the parties, shall specify and state the particular ground on which an instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection must specify particularly wherein the instruction is insufficient, or does not state the law, or what particular clause therein is objected to.

The court shall pass upon the objections to the instructions and shall either give each instruction as requested or proposed or positively refuse to do so, or give the instruction with modification, and shall mark or endorse upon each instruction in such a manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused or modified, and if modified, wherein and how modified. All instructions must be filed as a part of the record of the cause. No exceptions are necessary to the rulings of the court on the settlement of instructions.

The court reporter shall be present at such settlement and shall take down all the objections to any or all of the instructions given or refused by the court, together with modifications made therein, and the ruling of the court thereon.

- (e) When the instructions have been passed upon and settled by the court, and before the arguments to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as have been passed upon and settled. In charging the jury, the court shall give them all matters of law which it thinks necessary for the jury's information in rendering a verdict.
- (f) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the county attorney must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in evidence and argument. Counsel, in arguing the case to the judge, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence of the case.

History: En. 95-1910 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7201.

Error Cannot Be Predicated on Instructions Not Ruled on by the Court

Where the record in a criminal cause does not show that the court ruled, or was requested to rule, on defendant's requests for instructions, or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court. State v. McCarthy, 36 M 226, 236, 92 P 521.

Failure To Read Information

It is not error to fail to read the information, there being no statutory requirement for such procedure. State v. Gall, 135 M 131, 337 P 2d 932.

Instructions-Considered as a Whole

In determining whether an instruction is erroneous the charge as a whole must be considered. State v. Wong Sun, 114 M 185, 198, 133 P 2d 761.

Instructions must be considered as a whole and, if they fairly tender the case to the jury, the fact that one or more of the instructions, standing alone, is not as full or accurate as it might have been, is not reversible error. State v. Watson, 144 M 576, 398 P 2d 949.

Instructions-Duty of Court To Instruct

The defendant introduced testimony tending to show that "prior to the occasion in question" his reputation for "truth and veracity" in the community in which he lived was good, and his counsel offered an instruction on the subject. This the court refused, and it did not give any on that phase of the case. Whether the court was of the opinion that the offered instruction was not good, or that defendant was not entitled to an instruction upon the subject, the record does not disclose. Upon the evidence introduced defendant was entitled upon his request to the benefit of a proper instruction upon the subject; subject to the provisions of former sec-tion, the court is required to instruct a jury upon all matters of law necessary for its information in rendering a verdict. State v. Jackson, 88 M 420, 435, 293 P 309.

In a rape trial where there was no inconsistency, contradictory evidence, or proof of falsity shown in the prosecutrix's testimony, and no showing of malice or desire for revenge against the accused, it was not error for the court to refuse to give a cautionary instruction. State v. Lagge, 143 M 289, 388 P 2d 792.

Where defendant was convicted of robbery, trial court did not commit reversible error in giving no instruction to the jury on the defense of threat or menace since the jury in considering the court's instructions found the allegations of willful commission of the crime proven beyond a reasonable doubt. State v. Watson, 144 M 576, 398 P 2d 949.

Instructions—Duty To Object and Point Out Error

Where defendant fails to make objection to any portion of the charge or to any action of the trial court in its settlement during trial, he will not, on appeal, be heard to complain of error therein, or of any omission by the court to submit any special instruction. State v. Stone, 40 M 88, 93, 105 P 89.

The defendant, in a criminal case, is bound by instructions to which he does not object. State v. Crean, 43 M 47, 60, 114 P 603.

Where defendant, through his attorney, at the settlement of the instructions, stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal. State v. Chronopoulos, 60 M 329, 330, 199 P 266; State v. Evans, 60 M 367, 374, 199 P 440.

Where a defect in an instruction given was not pointed out specifically by defendant at the settlement of the instructions, the supreme court on appeal may not, under former section, consider an objection not so pointed out. State v. Bolton, 65 M 74, 81, 212 P 504; State v. Dougherty, 71 M 265, 266, 229 P 735; State v. Sawyer, 71 M 269, 272, 229 P 734; State v. Cassill, 71 M 274, 279, 229 P 716; State v. Vallie, 82 M 456, 268 P 493.

An objection made at the settlement of the instructions in a criminal case that a certain paragraph thereof "is not applicable to the facts of this case" is insufficient to warrant review of alleged errors urged under the specification relating thereto. State v. McClain, 76 M 351, 358, 246 P 956.

Objection to instruction that "it is repetitious and not a correct statement of the law" does not comply with this section. State v. Hay, 120 M 573, 194 P 2d 232, 237.

Objection to instruction that it "is not a correct statement of the law; it is not applicable to the facts in this case" does not comply with predecessor section. State v. Hay, 120 M 573, 194 P 2d 232, 237.

Any error in giving instructions is not available to appellants on appeal where the record shows no objections made by the appellants. State v. Holt, 121 M 459, 194 P 2d 651, 654.

Where defendant sought appeal from conviction for robbery on grounds that instructions to jury were incomplete, it was incumbent on the defendant to request more specific instructions at the time of trial and failure to do so did not furnish grounds for reversible error. State v. Watson, 144 M 576, 398 P 2d 949.

Objection to instruction cannot state merely that instruction is not the law but must state specifically wherein the instruction is insufficient, or what particular clause is objected to. State v. Schleining, 146 M 1, 403 P 2d 625.

Instructions—Duty To Submit an Instruction if Desired

It is well settled in this state that, if a party is not satisfied with an instruction proposed to be given, he must submit an instruction which more fully covers the particular matter, or he cannot be heard to complain, unless the instruction given be inherently wrong. Territory v. Hart, 7 M 489, 505, 17 P 718; Territory v. Manton, 8 M 95, 109, 19 P 387; State v. Broadbent, 19 M 467, 473, 48 P 775; State v. Gordon, 35 M 458, 467, 90 P 173; State v. Tracey, 35 M 552, 555, 90 P 791; State v. Powell, 54 M 217, 221, 169 P 46.

Where the defendant failed to offer an instruction on circumstantial evidence, he is in no position to complain of the omission to instruct the jury on that point. State v. Francis, 58 M 659, 670, 194 P 304.

Where the testimony of a physician touching a physical examination of the complaining witness was admitted solely for the purpose of showing that sexual intercourse might have taken place, and for none other, failure of the defendant to offer an instruction on the subject of its limitation deprived him of the right to complain that such an instruction was not given. State v. Richardson, 63 M 322, 328, 207 P 124.

Instructions—Requirement that Instructions Be Written

Mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions. State v. Fisher, 23 M 540, 551, 59 P 919.

A statute requiring written instructions in a criminal action is mandatory, and the violation thereof is reversible error. State v. Fisher, 23 M 540, 59 P 919.

A charge is oral if not in writing at the time of its delivery, and read to the jury as written. State v. Fisher, 23 M 540, 551, 59 P 919.

In the absence of waiver by the parties, it is imperative that all instructions be submitted to the jury in writing. State v. Tudor, 47 M 185, 131 P 632.

After the jury in a criminal case had retired to the jury room it was brought back at its request for information relative to the punishment which might be imposed under the indeterminate sentence statute. The court in the presence of defendant and counsel orally explained the provisions of the law and advised the jury as to the form in which it might return a verdict under that law. Defendant's counsel did not make any objection. Held, that the explanations made were not instructions on the law of the case and that, therefore, prejudicial error was not committed in making them orally. State v. Kennedy, 82 M 165, 167, 266 P 386.

Instructions—Review of Instructions

Even though the supreme court may not review instructions which were not given, it may examine the instructions which were given for the purpose of determining whether or not the jury was properly instructed. State v. Watson, 144 M 576, 398 P 2d 949.

Failure to instruct in certain particulars cannot be assigned as error, where the court has properly covered issues, since, in the absence of request for instructions, there is no ruling to review. State v. Watson, 144 M 576, 398 P 2d 949.

Instructions—Signing of Instructions—Necessity For

Requested instructions are required to be signed merely for the purpose of identification, to be used by the court in making up its charge to the jury; it is an irregularity, but no reversible error, for the court to permit the name and official title of the county attorney to be placed on instructions requested by him and given to the jury. State v. Martin, 29 M 273, 278, 74 P 725.

Instructions—Undue Emphasis

Trial judge did not err in giving five instructions to jury which were in part repetitious on the matter of conspiracy since the number of fact situations to be covered required them and while fewer instructions possibly would have been sufficient, they might have been difficult for the jury to understand. State v. Schleining, 146 M 1, 403 P 2d 625.

Opening Statement

Provision requiring the county attorney to make an opening statement in a prosecution for crime is merely directory. State v. Hall, 55 M 182, 185, 175 P 267.

Held, that where defendant, charged with burglary and three prior convictions, at the opening of the trial admitted the prior convictions, the court did not err

in permitting knowledge of the prior convictions to go to the jury by allowing the county attorney to read the information charging such convictions, in overruling an objection to question asked defendant on cross-examination as to the prior convictions, or in instructing the jury that if they found the defendant guilty of burglary they should then consider the matter of the former convictions, giving the provisions of the statute fixing punishment for that crime when aggravated by prior convictions of felonies, in view of provisions requiring the county attorney to state the case and offer evidence in support of the prosecution, and the fact that without such knowledge the jury could not intelligently fix the punishment to fit the crime. State v. O'Neill, 76 M 526, 532, 535, 248 P 215.

The county attorney must advert to evidence the state intends to prove in his opening statement, but is not required to state for what purpose he intends to produce certain evidence; hence the trial court did not err in denying a request of counsel for defendant requiring him to do so. State v. Keays, 97 M 404, 416, 34 P 2d 855.

It was not a denial of fair trial where the jury was allowed to consider the proven and admitted fact that the defendant in a first degree assault case had been convicted of three prior felonies, where only one would have served to increase the punishment, when they were instructed that the prior convictions were to be considered only in fixing the punishment if and when the defendant was found guilty

of the assault charge. Petition of Jones, 144 M 13, 393 P 2d 780.

Permitting Witness to Correct Testimony

The trial court did not abuse its discretion in permitting state's witness the opportunity to correct testimony made on direct examination under statute authorizing court to permit state to offer evidence upon their original cause during period reserved for rebuttal testimony. State v. Crockett, 148 M 402, 421 P 2d 722.

Purpose

Predecessor section did not undertake to do more than prescribe an orderly procedure for the trial of criminal cases. State v. Hall, 55 M 182, 185, 175 P 267.

Collateral References

Criminal Law@=633 (1), 680 (1), 801,

804 (1-9).

23 C.J.S. Criminal Law §§ 961, 1045; 23A C.J.S. Criminal Law §§ 1299, 1301, 1302.

Generally, see 53 Am. Jur. 1, Trial.

Definition of technical term, necessity of repeating, in different parts of

instructions in which it is employed. 7 ALR 135.

Recommendation of mercy in criminal case, instructions as to. 17 ALR 1117; 87 ALR 1362 and 138 ALR 1230.

Degrees of crime or included offenses, duty to charge as to reasonable doubt as between. 20 ALR 1258.

Law, propriety of instruction or requested instruction requiring jury in criminal case to take the law from the court, or advising them as to their duty in that regard. 72 ALR 899.

Instruction on circumstantial evidence in criminal case. 89 ALR 1379.

Exculpatory or mitigating statements in confession or admission introduced by prosecution, duty of court to instruct as to presumption of truthfulness of. 116 ALR 1459.

Alibi, duty of court to instruct on subject of. 118 ALR 1303.

Law enforcement, propriety of instruction in criminal case as to importance of, or as to duty of jury in that regard. 124 ALR 1133.

Reasonable doubt on part of individual juror. 137 ALR 394.

Common knowledge, propriety of instruction on matters of. 144 ALR 932.

"Actual doubt," use of term in instruction on reasonable doubt. 147 ALR 1046. Comments in judge's charge to jury

disparaging expert testimony. 156 ALR 530.

Duty in instructing jury to explain and define offense charged. 169 ALR 315.

Propriety and effect of court's indica-

Propriety and effect of court's indication to jury resulting in recommendation of suspended sentence. 8 ALR 2d 1001. Instruction, in prosecution based on

Instruction, in prosecution based on abortion, as to limited effect of evidence of commission of similar crimes by accused. 15 ALR 2d 1113.

Necessity for instruction to jury on question as to who are accomplices within rule requiring corroboration of their testimony. 19 ALR 2d 1387.

Instructions as to inferences arising from refusal of witness other than accused to answer questions on the ground that answer would tend to incriminate him. 24 ALR 2d 895.

Instruction as to presumption of continuing insanity in criminal case. 27 ALR 2d 121.

Necessity of written instruction where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR 2d 781.

Instructions in robbery prosecution limiting effect of evidence of other robberies.

42 ALR 2d 885.

Instructions as to conviction of lesser offense, against which statute of limitations has run, where statute has not run

against offense with which defendant is charged. 47 ALR 2d 890.

Instructions as to entrapment to commit sexual offense. 52 ALR 2d 1194.

Duty of court to instruct on self-defense, in absence of request by accused. 56 ALR 2d 1170.

Effect of failure or refusal of court, in prosecution for assault with intent to commit robbery, to instruct on assault and battery. 58 ALR 2d 808.

Instruction, in prosecution for gambling or gaming offense, as to limited effect of evidence of other acts of gambling. 64 ALR 2d 846.

Indoctrination by court of persons summoned for jury service. 89 ALR 2d 197.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written. 10 ALR 3d 501.

DECISIONS UNDER FORMER LAW

Instructions — Bill of Exceptions Required To Review Instructions

Former provision prohibiting reversal by the supreme court for error in instructions where such error was not specifically pointed out and excepted to at the settlement of the instructions, and the error and exception incorporated and settled in a bill of exceptions, was mandatory, and error in instructions could not be considered on appeal in a criminal case where the record did not contain a bill of exceptions. State v. Cook, 42 M 329, 331, 112 P 537.

Errors in instructions must be specifically pointed out at the time the instructions are settled and the exceptions presented in a bill of exceptions before they will be considered on appeal. State v. Thomas, 46 M 468, 128 P 588.

Under former section, to entitle appellant in a criminal action to a review of an instruction given, the record was required to disclose that at the time of settlement of the instructions he made suitable objections and reserved an exception thereto. State v. Brodock, 53 M 463, 164 P 658; State v. Neidamier, 98 M 124, 37 P 2d 670.

Errors in the instructions were not ground for reversal on appeal unless the same were specifically pointed out and excepted to. State v. Kahn, 56 M 108, 120, 182 P 107.

An erroneous instruction, given without objection, became the law of the case, the supreme court on appeal being precluded by former section from reversing a judgment for error in instructions not specifically pointed out and excepted to at the settlement of the instructions. Hawley v. Richardson, 60 M 118, 128, 198 P 450.

Under former section, errors in giving or refusing instructions cannot be reviewed on appeal unless they, with the proceedings had at the settlement thereof, are incorporated in a bill of exceptions, even though they constitute a part of the judgment-roll of technical record, section

12043, R. C. M. 1921 (omitted), providing otherwise, having been superseded by former section. State v. Carmichael, 62 M 159, 161, 204 P 362; State v. Zorn, 99 M 63, 41 P 2d 513.

Held, that the provision of former section prohibiting the supreme court from reversing a judgment in a criminal cause for any error in instructions not specifically pointed out and excepted to at the settlement of instructions and incorporated and settled in the bill of exceptions, applies only to error allegedly committed in refusing to give offered instructions. State v. Daw, 99 M 232, 234, 43 P 2d 240; State v. Heaston, 109 M 303, 314, 97 P 2d 330.

Where attorney for defendant presented bill of exceptions and prayed that the same be signed, settled and allowed, he could not be heard to complain on appeal that his bill of exceptions was not accurate. State v. Pankow, 134 M 519, 333 P 2d 1017, 1020.

The provisions of former section forbidding the supreme court to reverse a judgment for errors in instructions unless such errors are specifically pointed out at the time the instructions are settled is mandatory, and in the absence of such exceptions the court cannot consider errors predicated upon the instructions, however erroneous or prejudicial they may be. State v. Watson, 144 M 576, 398 P 2d 949.

Instructions—Duty To Object and Point Out Error

Where instructions as finally proposed to be given were not objected to by counsel for defendant, the district court by statute was expressly forbidden to grant a new trial and the supreme court was forbidden to reverse the cause, even if error existed in such instructions. State v. Donges, 126 M 341, 251 P 2d 254, 255; State v. Bubnash, 142 M 377, 382 P 2d 830.

95-1911. When order of trial may be departed from. When the state of the pleading requires it, or in any other case, for good reasons, and in

the discretion of the court, the order prescribed in the last section may be departed from.

History: En. 95-1911 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7202.

95-1912. View of place of offense or property. When the court deems it proper that the jury view any place or personal property pertinent to the case, it will order the jury to be conducted in a body under the custody of the sheriff or bailiff, to view said place or personal property in the presence of the defendant and his counsel. The place or personal property will be shown them by a person appointed by the court for that purpose, and they may personally inspect the same. The sheriff or bailiff must be sworn to suffer no person to speak or otherwise communicate with the jury nor to do so himself on any subject connected with the trial, and to return them into the courtroom without unnecessary delay or at a specified time as the court may direct.

History: En. 95-1912 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7228.

Condition of Premises

The fact that the premises to be viewed had accumulated dirt which had been hastily swept away, that doors had been replaced and the view was bleak and morbid furnished no ground for interfering with an order permitting a view of the premises. State v. Allison, 122 M 120, 199 P 2d 279, 292.

Defendant May Waive Right To Be

Since the only purpose of a view by the jury of the place where a homicide was committed is to enable the jurors better to understand the evidence heard by them at the trial and testimony may not there be taken for any purpose, the defendant may waive his right to be present at the viewing, and where he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he will be held to have waived his right in that behalf. State v. Cates, 97 M 173, 191, 33 P 2d 578.

Discretion of Court

Matter of permitting the jury to view cattle charged to have been stolen by defendant and recaptured was within the discretion of the trial court, and in the absence of a showing of abuse of its discretion in that behalf error may not be said to have been committed in permitting the viewing. State v. Arnold, 84 M 348, 362, 275 P 757.

The matter of permitting the jury to view the premises rests entirely in the

discretion of the trial court which will not be interfered with except in case of manifest abuse. State v. Allison, 122 M 120, 199 P 2d 279, 292.

Waiver of Alleged Error in Permitting View

By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view an automobile in which the shooting occurred, defendant waived his right to secure a review of the propriety of the order urged on the ground that no proper foundation had been laid for the view in that it was not shown that the car was in the same condition as at the time of the killing. State v. Cates, 97 M 173, 191, 33 P 2d 578.

Collateral References

Criminal Law \$\infty 651 (1), (2). 23 C.J.S. Criminal Law \$ 986. 53 Am. Jur. 349-354, Trial, \$\\$ 441-451.

Occurrences during a view as warning the jury's discharge without letting in plea of former jeopardy upon subsequent trial. 4 ALR 1266.

trial. 4 ALR 1266.

Presence of accused during view by jury. 30 ALR 1357 and 90 ALR 597.

May demonstration before jury, otherwise proper, be permitted outside courtroom. 60 ALR 574.

Right of jurors to sustain their verdict by affidavits or testimony to effect that they were not influenced by impressions from unauthorized view of the property. 93 ALR 1452.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed, 124 ALR 841.

- 95-1913. Conduct of jury after submission of case. (a) Jurors, Separation of During Trial. The jurors sworn to try an action may, at any time before the submission of the case, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.
- (b) Retirement of Jury. When the jury retires to consider its verdict an officer of the court shall be appointed to keep them together and to prevent conversations between the jurors and others.
- (c) Items Which May be Taken in the Jury Room. Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in his possession. The jury may also take with them any exhibits which the court may deem proper, and notes of the proceedings taken by themselves.
- (d) After Retirement, May Return into Court for Information. After the jury has retired for deliberation, if there be any disagreement among them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information requested may be given in the discretion of the court; if such information is given it must be given in the presence of the county attorney and the defendant and his counsel.
- (e) Admonition. The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

History: En. 95-1913 by Sec. 1, Ch. 196,

Source: Revised Codes of Montana 1947, sections 94-7230, 94-7231, 94-7304; and Illinois Code of Criminal Procedure, Chapter 38, section 115-4.

Impliedly Repealing Earlier Statute on Separation after Charge

Predecessor section declaring that jury may be permitted to separate at any time before submission of case to them was enacted some twenty years after section prohibiting separation of jury in criminal cases after hearing the charge and impliedly repealed the latter section; hence error was not committed in permitting separation for lunch after the giving of instructions and before the argument of counsel, i. e., at any time before submission of the case to them. State v. DeTonancour, 112 M 94, 99, 112 P 2d 1065.

Juror's Opinion

Where a juror on his voir dire in a burglary case stated that he had formed an opinion based on what he had heard on the radio, television and read in the newspapers, but, had not discussed the case with anyone purporting to know any of the facts about it and declared under oath that he could lay aside his opinion and judge the case solely on the evidence presented, it was not error to deny defendant's challenge. State v. Moran, 142 M 423, 384 P 2d 777.

No Presumption of Prejudice

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without ob-

jection by defendant, were taken to the jury room, at the close of the trial, apparently without the affirmative consent of the defendant and without an order of the court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of defendant. State v. Cates, 97 M 173, 197, 33 P 2d 578.

Oral Instructions

Where in a prosecution for rape the jury, after retiring to the jury room, were returned into court for information relative to a certificate of birth of the prosecutrix, which had been excluded from the evidence, and an affidavit made by her to the effect that defendant had not committed any offense against her, which was admitted, and the court orally advised them that the certificate had been excluded and that as to the affidavit they would have to determine for themselves, its action in not going further and instructing them orally as to what weight should be given the affidavit was proper, since instructions, in the absence of a waiver by the parties, must be delivered in writing. State v. Duncan, 82 M 170, 177, 266 P 400.

Oral Instructions—Presence of Defendant

After retiring to the jury room to deliberate of their verdict in a criminal cause, the jury returned, asking the court whether two instructions given were conflicting. The court, in the absence of defendant though in the presence of his attorney, orally instructed the jury to disregard one of them and withdrew it. Held, that withdrawing the instruction and directing the jury to disregard it was instructing the jury orally, constituting reversible error, and that doing so in the absence of the defendant from the courtroom was contrary to the provisions of predecessor section. State v. Jackson, 88 M 420, 434, 293 P 309.

Rereading Testimony at Jury's Request

It is within the trial court's discretionary power to grant a jury's request to reread parts of testimony and such procedure is authorized by statute. State v. Armstrong, 149 M 470, 428 P 2d 611.

Showing of Compliance

The record on appeal in a criminal cause which disclosed that when an adjournment was taken, "the jury was admonished by the court and placed in charge of the sheriff," etc., was sufficient to disclose compliance with statute, imported verity, and could not be impeached by

affidavit. State v. Hall, 55 M 182, 186, 175 P 267.

Taking Depositions to Jury Room

Held, that it was error for the trial court to send to the jury room as an exhibit an alleged confession headed "Affidavit," which to all intents and purposes was a deposition, in view of former section which expressly prohibited the jury from taking depositions to the jury room for consideration during its deliberations. State v. Crighton, 97 M 387, 403, 404, 34 P 2d 511.

Taking Exhibits to Jury Room

Personal presence of the defendant is required at the trial in felony cases. After the jury had retired to the jury room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes and other articles found in defendant's room, be sent to them. While defendant was not present in the court-room, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by statute to be taken to the jury room. State v. Olson, 87 M 389, 395, 287 P 938.

Taking Photographs to Jury Room

In a criminal prosecution for involuntary manslaughter, photographs of the scene of the accident are "all papers" within the meaning of that phrase as it appears in the statute, thus the trial court properly sent the photographs along with the jury when they retired to the jury room for deliberations. State v. Medicine Bull, — M —, 445 P 2d 916.

Time of Admonition

The court is not required to admonish the jury before it has been completed; as, where a recess has been taken before the completion of the jury; the body of men intended for a jury is not such, under section 93-1203, until it has been sworn to try and determine by verdict a question of fact. State v. Hall, 55 M 182, 186, 175 P 267.

Where a jury was completed on the afternoon of the sixth of the month, and an adjournment was then taken until the seventh, and at noon on the seventh a recess was taken until 1:30 p.m. of that day, a new trial will not be granted because of the failure of the court to give to the jury the full statutory admonition, where the jury was properly admonished, as required by this section, at each ad-

journment taken after the noon recess on the seventh. State v. Hall, 55 M 182, 186, 175 P 267.

Waiver of Objection

Where on motion for new trial it is found that counsel for defendant consented to the taking of certain exhibits to the jury room previously admitted in evidence on a prosecution for murder, such consent constitutes a waiver of any objection to the sending of the exhibits to the jury during retirement. State v. Allen, 23 M 118, 57 P 725.

When Information Deemed Oral

The information referred to in predecessor section was deemed to be oral if it was not in writing at the time of its delivery and read to the jury as written. State v. Fisher, 23 M 540, 553, 59 P 919.

Collateral References

Contempt \$\infty\$14; Criminal Law \$\infty\$848,

Contempt 14; Criminal Law 848, 850, 852, 854 (1-9), 857 (1), 858 (1-4), 863 (1), (2), 867. 23A C.J.S. Criminal Law § 1348 et seq. 53 Am. Jur., Trial, p. 626 et seq., § 861 et seq.; p. 659 et seq., § 921 et seq.; p. 667 8 442 667, § 942.

Separation of jury as requiring discharge or acquittal of accused. 79 ALR 843 and 21 ALR 2d 1157.

Law Review

General Admonitions To Jury Not To Read Newspaper Accounts of Trial Held Sufficient To Counteract Adverse Publicity (State v. Moran, 142 M 423, 384 P 2d 777), 25 Mont. L. Rev. 156 (1963).

95-1914. Court may adjourn during absence, but deemed open. While the jury is absent the court may adjourn from time to time as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is returned or the jury discharged.

History: En. 95-1914 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7308.

- 95-1915. Verdict. (a) Return. The verdict shall be unanimous in all felonies and two-thirds $(\frac{2}{3})$ in all misdemeanors and appeals from justice or police courts. Such verdict shall be signed by the foreman and returned by the jury to the judge in open court.
- (b) Several Defendants. If there are two (2) or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.
- (c) Conviction of a Lesser Offense. The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

(d) Poll of Jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence the jury may be directed to retire for further deliberations or may be discharged.

History: En. 95-1915 by Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Advisory Committee Note:

Amendment by addition of second paragraph brings this section into conformity with section 94-7234, R. C. M. 1947.

Cross-References

Right to unanimous verdict in felony cases, Mont. Const. Art. II, § 23.

Degree of Offense

In charging burglary, it is not necessary to allege in the information the time of the entry, but the jury, if they convict, must

find the degree. State v. Copenhaver, 35 M 342, 344, 89 P 61; State v. Mish, 36 M 168, 175, 92 P 459.

Where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense; it is then made the duty of the jury to determine from the evidence the particular degree of the crime of which the accused is guilty, if guilt is shown. State v. Wiley, 53 M 383, 386, 164 P 84.

Degrees of Murder

There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment with reference to the presence or absence of circumstances of aggravation. State v. Hliboka, 31 M 455, 458, 78 P 965.

Finding as to Previous Conviction

In an information charging, among other things, a prior conviction of an offense in another state which, in this state, is punishable by imprisonment in the state prison, it is unnecessary to allege the facts constituting the crime in the foreign state, and it is immaterial whether the offense for which defendant is alleged to have been previously convicted in the sister state is a felony there. State v. Paisley, 36 M 237, 247, 92 P 566.

While it is not necessary for the jury

While it is not necessary for the jury to find that a charge of prior conviction is true where the charge is admitted, if it does so find, defendant is not in a position to complain. State v. O'Neill, 76 M 526, 528, 248 P 215.

Where defendant's answer admits the charge of a previous conviction, finding of previous conviction is unnecessary and jury's failure to make such finding did not render invalid the judgment increasing sentence for a prior conviction. State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 222.

Insufficient Verdict

A party cannot be charged with one crime and be convicted of another independent offense; thus, a verdict of guilty of malicious destruction of property is insufficient under a charge of the malicious burning of property; the offense found does not include the offense charged; in such a case it is the right and duty of the trial court to require the jury to return some form of verdict authorized by law, or to report a disagreement. State v. Sieff, 54 M 165, 168, 168 P 524.

Lesser Offense

Where the defendant was specifically charged with burglary in the nighttime, constituting the first degree of the offense of burglary, the jury could not convict him of the crime in the second degree, as

having been committed in the daytime, since the former does not include the latter, and inasmuch as the defendant need only meet the accusation as made, and not another and a different one, and the prosecution is held to proof of the charge as set out in the information. State v. Copenhaver, 35 M 342, 345, 89 P 61.

An information charging murder, when

An information charging murder, when stripped of the terms conveying the idea of deliberation, premeditation, and malice, sufficiently charges manslaughter, and the accused may be found guilty of the lesser offense. State v. Crean, 43 M 47, 53, 114 P 603.

Murder in the first degree includes manslaughter. State v. Crean, 43 M 47, 53, 114 P 603.

While the offense of kidnaping includes the minor offenses of false imprisonment and assault in the third degree, the court need not so formulate the charge that the jury may find the defendant guilty of a lower offense or of an included offense, where the evidence is such as to show that defendant is guilty of the offense charged or is entitled to an acquittal. State v. McDonald, 51 M 1, 16, 149 P 279.

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 288.

Manslaughter Not a Degree of Murder

Where there is evidence tending to show that defendant is guilty of murder in the first degree, murder in the second degree, and manslaughter, it is the duty of the court to instruct that a verdict for manslaughter may be returned, manslaughter not being a degree of murder. State v. Shadwell, 26 M 52, 59, 66 P 508.

Poll of Jury

Where on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided the sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. State v. Asher, 63 M 302, 306, 206 P 1091.

Sentence for Prior Conviction

A judgment that defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided," is not void as to the five years for former conviction. State v. Connors, 27 M 227, 228, 70 P 715.

Value of Property

Held, in view of former section providing that in a prosecution for an offense against the property of another, the jury must ascertain and declare in their verdict not only the value of the property taken but also the amount restored, that refusal to permit defendant to introduce evidence to show the amount restored to the person from whom he obtained money by false pretenses was prejudicial error. State v. Mason, 62 M 180, 190, 204 P 358. Where the fact that all of the articles

Where the fact that all of the articles taken by one charged with burglary were found and restored to the owner was before the jury, failure of the verdict to declare the value of the property taken and the amount restored, if any, and the value thereof, as required by former statute which closed with the words that "the jury's failure to do so does not affect the validity of their verdict," was not a fatal defect, if the provisions of the section were to guide the jury in fixing punishment. State v. Dixson, 80 M 181, 207, 208, 260 P 138.

Verdict by Full Panel

Where, on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided that the sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. State v. Asher, 63 M 302, 306, 206 P 1091.

Verdict Not Subject to Technical Pleading Rules

A verdict is not subject to the technical rules which govern pleadings. The object sought in construing a verdict is to ascertain the intention of the jury, and to that end reference may be made to the pleadings, the evidence and the instructions of the court. Consolidated Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152; Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272.

Verdict upon Finding of Insanity

Where defendant, charged with assault in the first degree, relied wholly upon the

defense of insanity, the court's instruction that the jury might find defendant guilty of assault in the first, second, or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." State v. Crowe, 39 M 174, 184, 102 P 579.

Collateral References

Criminal Law \$\infty\$=870, 872, 874, 877, 881 (1), 883, 889, 1202 (5); Indictment and Information \$\infty\$=189 (1), 190, 191.

17 C.J.S. Contempt § 22; 23A C.J.S. Criminal Law § 1388 et seq.; 24B C.J.S. Criminal Law § 1970; 42 C.J.S. Indictments and Informations §§ 271-300.

53 Am. Jur., Trials, p. 681 et seq., § 970 et seq.; p. 700, § 1009; p. 703 et seq., § 1015 et seq.; p. 715, § 1035; p. 732, § 1057.

Recommendation of mercy. 17 ALR 1117; 87 ALR 1362 and 138 ALR 1230.

Bail bond, return of verdict as discharging sureties from liability. 20 ALR 624.

Larceny or embezzlement, failure of verdict on conviction of, to state value of property. 79 ALR 1180.

Compromise verdict, judge's express or implied authorization of, where jury disagrees. 85 ALR 1439.

Right of court to accept verdict upon one or more counts of an indictment when jury is unable to reach a verdict on all counts or is silent as to part of counts, and effect of such acceptance. 114 ALR 1406.

Propriety and effect of court's indication to jury that court would suspend sentence. 8 ALR 2d 1001.

Validity and efficacy of accused's waiver of unanimous verdict. 37 ALR 2d 1136.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR 3d 1461.

Quotient verdicts, 8 ALR 3d 335. Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 ALR 3d 866.

Inconsistency of criminal verdict as between different counts of indictment and information, 18 ALR 3d 259.

DECISIONS UNDER FORMER LAW

Finding as to Previous Conviction

For a mere informality in the wording of a verdict finding the defendant guilty of robbery and also "guilty of prior convictions," instead of following the language of former section and saying, "We find the charge of previous conviction true," the judgment of conviction would not be reversed, since the provision was

directory only, and the verdict in question substantially conformed to it. State v. Gordon, 35 M 458, 465, 90 P 173; State v. Paisley, 36 M 237, 248, 92 P 566.

Insufficient Verdict

Where a jury in a criminal case brought in a verdict of guilty, and, in the attempted exercise of its former right to fix the punishment, set out in its verdict the maximum of years the defendant was to serve in prison, but neglected to set out the minimum, the court should have, on motion therefor, sent it out again to fill in the omission. In re Gomez, 52 M 189, 190, 156 P 1078.

Manner of Taking Verdict

Purpose of former section dealing with manner of taking verdict and requiring the names of the jurors to be called when their verdict was delivered, was to ensure their presence before the verdict was de-livered. State v. De Lea, 36 M 531, 534, 93 P 814.

95-1916. Defendant, when to be discharged. If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the pleading and proof which may be obviated by a new indictment or information the court may order his detention to the end that a new indictment or information may be filed by the county attorney.

History: En. 95-1916 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7418.

Collateral References

23A C.J.S. Criminal Law § 1409.

Evidence, power and duty of court to direct or advise acquittal in criminal case for insufficiency of. 17 ALR 910.

Dismissing defendant in criminal case for insufficiency of evidence after submission of case to jury, power of court as to. 131 ALR 187.

Direction of verdict based on uncontradicted testimony in criminal case as affected by credibility of witness. 62 ALR 2d 1210.

Argument or comment as to trial judge's refusal to direct verdict against him, effect of counsel's. 10 ALR 3d 1330.

CHAPTER 20

JUSTICE AND POLICE COURT PROCEEDINGS

Section 95-2001. Initiation of proceedings.

95-2002. Minutes.

95-2003. 95-2004. Change of place of trial.

Trial in justice and police courts.

95-2005. Formation of trial jury.

95-2006. Verdict.

95-2007. Sentence and judgment. 95-2008. Execution of judgment. 95-2008.1. Fines for city ordinance violations tried on appeal—half to city.

95-2009. Appeal.

95-2001. Initiation of proceedings. In justice and police courts all criminal prosecutions must be commenced by complaint under oath.

History: En. 95-2001 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947. section 94-100-1 and Montana constitution, article III, section 8.

Cross-References

Prosecution of criminal offenses, Mont. Const. Art. III, § 8.

Issuance of Arrest Warrant

It is the duty of a justice of the peace, when he is satisfied upon the complaint of any citizen that an offense has been committed, to issue a warrant of arrest and to have the offender brought before him for trial or examination, as the case may be. State v. O'Brien, 35 M 482, 494, 90 P 514.

Limited Jurisdiction

Police courts, like justices' courts, are courts of limited jurisdiction and have only such authority as is expressly conferred upon them. State ex rel. Marquette v. Police Court, 86 M 297, 308, 283 P 430.

Nature of Action

The nature of an action for the violation of a city ordinance, whether civil or criminal, must be determined by the relief sought in the proceeding, without regard to the question whether some other proceeding may or may not be brought under the state statutes. State ex rel. Marquette v. Police Court, 86 M 297, 308, 283 P 430.

Pleading

In a criminal proceeding, it is sufficient to plead a city ordinance by reference to its title, section and subdivision of section. City of Philipsburg v. Weinstein, 21 M 146, 53 P 272.

For an instance of a complaint charging a sale of liquor, in violation of the local option law, and meeting all the requirements of the statute, see State v. O'Brien, 35 M 482, 494, 90 P 514.

Sufficiency of Complaint

A complaint was sufficient where it stated facts constituting a public offense and charged a violation which was a misdemeanor within the jurisdiction of the justice of the peace court. State ex rel. Borberg v. District Court, 125 M 481, 240 P 2d 854, 856.

Where Issues Narrowed from General Allegations to Specific Averments

Where general allegations in a complaint are followed by specific averments, the issues are narrowed to those embraced

within the particular allegations. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

Where Offense Erroneously Named, Not Fatal to Pleading

The general rule is that when the facts, acts and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

Collateral References

Criminal Law 211 (1), 252 (1); Indictment and Information 4.

22 C.J.S. Criminal Law §§ 303 et seq., 321, 373; 42 C.J.S. Indictments and Informations § 14.

formations § 14.
47 Am. Jur. 2d 950, Justices of the Peace, § 57.

Power of justice of peace to take affidavit as basis for warrant of arrest. 16 ALR 923.

Law Review

Mason & Kimball, Montana Justices' Courts—According to the Law, 23 Mont. L. Rev. 62 (1961).

95-2002. Minutes. A docket must be kept by the justice of the peace, or police judge, in which must be entered each action, and the proceedings of the court therein.

History: En. 95-2002 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-100-3.

Collateral References

22 C.J.S. Criminal Law § 384.

- 95-2003. Change of place of trial. (a) The defendant or prosecution, before trial, may move for a change of place of trial on the ground that there exists in the township in which the charge is pending such prejudice that a fair trial cannot be had in such township.
- (b) The motion shall be in writing and supported by affidavit which shall state facts showing the nature of the prejudice alleged. The defendant or the state may file counteraffidavits. The court shall conduct a hearing and determine the merits of the motion.
- (c) If the court determines that there exists in the township where the prosecution is pending such prejudice that a fair trial cannot be had it shall transfer the cause to any other court of competent jurisdiction in any township where a fair trial may be had.

History: En. 95-2003 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-100-6 (2) and 94-100-7.

Change of Place of Trial

It seems that a police judge may grant a change of the place of trial of a criminal cause pending before him upon a motion, supported by a proper showing, either for bias or prejudice of such judge, or prejudice in the citizens of the town-ship. In re Graye, 36 M 394, 397, 93 P 266.

A change of venue cannot be had from

a justice of the peace court of one county to a justice of the peace court of another county. State ex rel. Gillett v. Cronin, 41 M 293, 295, 109 P 144.

95-2004. Trial in justice and police courts. (a) Method of Trial:

- (1) The defendant is entitled to a jury of six (6) qualified persons, but may consent to a lesser number.
- A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket.
- Questions of law shall be decided by the court and questions of fact by the jury except when a jury trial is waived, then the court shall determine both questions of law and of fact.
- (b) Plea of Guilty. Before or during trial a plea of guilty may be accepted when:
 - The defendant enters a plea of guilty in open court, and
- The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.
- Presence of Defendant. The trial may be had in the absence of the defendant; but if his presence is necessary for any purpose, the court may require the personal attendance of the defendant at the trial.
- Time to Prepare for Trial. After plea the defendant shall be entitled to a reasonable time to prepare for trial.

History: En. 95-2004 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-100-11, 94-100-12, 94-100-19, 94-1206, 94-7004, 94-7008; Montana constitution, article III, section 23; Illinois Code of Criminal Procedure, Chapter 38, section 115-2.

Cross-References

Juries in justices' courts, sec. 93-1206. Right of trial by jury, Mont. Const. Art. III, § 23.

Questions of Law-Questions of Fact

Provision that court shall decide questions of law but can give no charge with

respect to matters of fact was the statement in legislative form of an ancient legal maxim which has been enacted in many statutes, and has been deemed so vital to the rights and liberties of the people that it has been engrafted upon the constitutions of states. State v. Sullivan, 9 M 174, 177, 22 P 1088.

Collateral References

Criminal Law 247, 251, 254; Jury 4,

29 (2), (3). 22 C.J.S. Criminal Law §§ 367, 372, 378,

379; 50 C.J.S. Juries §§ 7, 84. 47 Am. Jur. 2d 668-670, Jury, §§ 51, 52.

DECISIONS UNDER FORMER LAW

Written "Special Plea in Bar" Not Authorized

Justice of the peace was acting within his jurisdiction and in accordance with the law in overruling the defendant's written "Special Plea in Bar" and ordering the

defendant to answer to the complaint in accordance with statutory requirements explicitly calling for oral plea. State ex rel. Borberg v. District Court, 125 M 481, 240 P 2d 854, 857, 859, 861.

95-2005. Formation of trial jury. (a) Number of Jurors. A jury in justice or police court shall consist of six (6) persons, but the parties may agree to a number less than six (6).

(b) Formation of Trial Jury. The county jury commission, at the time of preparing the district court jury list, shall prepare a jury list for each justice and police court within the county. Each list shall consist of residents of the appropriate township, city or town. Such list shall be selected in any reasonable manner which shall ensure fairness, and it shall include a number of names sufficient to meet the annual jury requirements of the respective court. Additional lists may be prepared if required. The list shall be filed in the office of the clerk of the district court and the appropriate list shall be posted in a public place in each such township, city or town, and such list shall comprise the trial jury list for the ensuing year for such township, city or town.

Trial jurors shall be summoned from the jury list by notifying each orally that he is summoned and of the time and place at which his attendance is required.

The prosecuting attorney and the defendant or his attorney shall conduct the examination of prospective jurors. The court may conduct an additional examination. The court may limit the examination by the defendant, his attorney or the prosecuting attorney if the court believes such examination to be improper.

Each party may challenge jurors for cause, and each challenge must be tried by the court. The challenge may be for any cause enumerated in section 95-1909(d) (2) of this code. Each defendant shall be allowed three (3) peremptory challenges and the state shall be allowed the same number of peremptory challenges as all of the defendants.

History: En. 95-2005 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968.

Source: Montana constitution, article III, section 23.

Cross-References

Juries in justices' courts, sec. 93-1206. Number of jurors, Mont. Const. Art. III, § 23.

- 95-2006. Verdict. (a) Return. The verdict of the jury must in all cases be general. It shall be returned by the jury to the judge in open court, who must enter, or cause it to be entered in the minutes. Two-thirds (2/3) in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all jurors had concurred therein.
- (b) Several Defendants. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.
- (c) Poll of Jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not a two-thirds $(\frac{2}{3})$ concurrence, the jury may be directed to retire for further deliberations or may be discharged.
- (d) Discharge of Jury. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

History: En. 95-2006 by Sec. 1, Ch. 196, L. 1967.

Source: Montana constitution, article III, section 23; Revised Codes of Montana 1947, sections 94-100-21 to 94-100-23.

Cross-References

Two-thirds in number of jury for verdict, Mont. Const. Art. III, § 23.

DECISIONS UNDER FORMER LAW

Discharge of Jury without Verdict

In a prosecution for murder, where the jury was discharged at the end of a mistrial, because there was "a reasonable probability that the jury cannot agree," an entry in the minutes in those words was sufficient under former section pro-

viding that jury was not to be discharged, after cause was submitted to them, until rendering their verdict unless it appeared that there was a reasonable probability that they could not agree. State v. Keerl, 33 M 501, 513, 85 P 862, affirmed in 213 US 501, 53 LEd 734, 29 S Ct 469.

- 95-2007. Sentence and judgment. (a) If a judgment of acquittal is rendered the defendant must be immediately discharged.
- (b) After a plea or verdict of guilty, or after a judgment against the defendant, the court must designate a time for sentencing, which must be within a reasonable time after the verdict or judgment is rendered. The sentence must be entered in the minutes of the court as soon as it is imposed.
- (c) If the defendant pleads guilty, or is convicted either by the court or by a jury, the court must impose a sentence of fine or imprisonment or both, as the case may be.
- (d) The determination and imposition of sentence shall be the exclusive duty of the court.

History: En. 95-2007 by Sec. 1, Ch. 196, L. 1967.

Waiver of Sentencing Date

Where a person accused in a justice's court of a misdemeanor is convicted, and the justice immediately proceeds, upon the return of the verdict, to pronounce sentence without any objection from the defendant, his silence is a waiver of his right to a postponement of judgment. Hosoda v. Neville, 45 M 310, 312, 123 P 20.

Defendant convicted in a justice of the peace court of driving a vehicle on a highway while under the influence of intoxicating liquor in violation of section 32-2142 waived postponement of the sentencing date where there was a stipulation to the sentencing date. Wilson v. Brodie, 148 M 235, 419 P 2d 306, 308.

Collateral References

Criminal Law 257-259.
22 C.J.S. Criminal Law §§ 382, 384.

- 95-2008. Execution of judgment. (a) The judgment must be executed by the sheriff, constable, marshal or policeman of the jurisdiction in which the conviction was had.
- (b) When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution.
- (c) If a judgment is rendered imposing a fine only, without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one (1) day's imprisonment for every ten dollars (\$10.00) of the fine.

When such a judgment is rendered the defendant must be held in custody the time specified in the judgment, unless the fine is sooner paid.

(d) Any officer charged with the collection of fines, under the provisions of this chapter, must return the execution to the judge within thirty (30) days from its delivery to him, and pay over to the judge the money collected therefrom, deducting his fees for the collection.

All fines imposed and collected by a justice or police court must be paid to the treasurer of the county, city or town as the case may be, within thirty (30) days after the receipt of the same, and the justice or police judge must take duplicate receipts therefor, one (1) of which he must deposit with the county or city or town clerk as the case may be.

History: En. 95-2008 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-100-25, 94-100-28, 94-100-39, 94-100-40, 94-100-45 and 94-100-46.

Fine with or without Imprisonment

Legislature recognized a distinction between a judgment for fine, and one for fine with imprisonment until the fine be paid. State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.

Imprisonment for Nonpayment of Fine

Where a defendant was imprisoned under predecessor section for the full period prescribed in a judgment rendered in a justice court, such imprisonment operated ipso facto to satisfy and discharge the

judgment. Petelin v. Kennedy, 29 M 466, 75 P 82.

Judgment for Fine Only

A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county jail until the fine be paid, is not a judgment for fine only, within the meaning of predecessor section. State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.

Collateral References

Criminal Law 257-259; Fines 10, 18-20.

22 C.J.S. Criminal Law §§ 125, 382, 386, 388; 36 C.J.S. Fines §§ 9, 19.

95-2008.1. Fines for city ordinance violations tried on appeal—half to city. All fines obtained from a judgment in a higher court on an appeal from a police court for violation of a city ordinance, tried de novo, in the higher court, shall be paid to the county treasurer who shall before thirty-one (31) days after receipt of the sum forward one-half $(\frac{1}{2})$ of the amount to the treasurer of the city in which the action originated.

History: En. Sec. 1, Ch. 32, L. 1967.

- 95-2009. Appeal. (a) All cases on appeal from justices' or police courts must be tried anew in the district court and may be tried before a jury of six (6) which may be drawn from either the regular panel or jury box No. 3.
- (b) The defendant may appeal to the district court by giving written notice of his intention to appeal within ten days (10) days after judgment.
- (c) Within thirty (30) days the entire record of the justice or police court proceedings shall be transferred to the district court or the appeal shall be dismissed. It shall be the duty of the defendant to perfect the appeal.

History: En. 95-2009 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The defendant has the burden to perfect his appeal from justice court. This burden is sustained when the defendant

has posted the requisite bond, given written notice of his intention to appeal, filed the notice, served the notice and prepared any copies of documents necessary to the appeal, such as the warrant, complaint, minute entries and judgment as signed by the police judge or justice of the peace. The police judge or justice of the peace is obligated to transmit all necessary documents to the District Court.

Source: Revised Codes of Montana 1947, sections 94-100-33, 94-100-34 and 94-100-38.

Appeal Waives Certain Irregularities

Since the district court does not, on appeal from a justice's court, sit as a court of review, but tries the case de novo, any irregularities attending the rendition of the judgment in a case in which the justice had jurisdiction of the offense charged and of the defendant are waived by taking the appeal. State v. O'Brien, 35 M 482, 491, 90 P 514.

The result of an appeal from a judgment of a justice of the peace, in a prosecution for misdemeanor, is to abrogate that judgment and to hold defendant under the original warrant of arrest for trial de novo in the district court, and the defendant cannot complain, on habeas corpus, of any irregularity committed by the justice in rendering judgment. Hosoda v. Neville, 45 M 310, 313, 123 P 20.

Dismissal for Want of Prosecution Void

Where an appeal is taken to the district court from a conviction in a police court for a liquor law violation, but neither the city nor the defendant requested the cause be set for trial, the judge of the court could not order the appeal dismissed "for want of prosecution" without giving notice to the defendant. Such an order is void and in excess of jurisdiction. State ex rel. Healy v. District Court, 125 M 77, 230 P 2d 763.

Effect of Payment of Fine after Appeal

Where defendant was convicted in a police court of the violation of a town ordinance and appealed to the district court and served notice of his appeal to the district court while in jail serving a sentence imposed for his nonpayment of the fine, the fact the defendant had paid the fine before the hearing in the district court did not effect an abandonment of his appeal. Town of White Sulphur Springs v. Voise, 136 M 1, 343 P 2d 855, 857.

No Right of Appeal by Cities

Defendant, charged with wrongfully obstructing an alley, was proceeded against under statutes governing criminal procedure in police courts, convicted and appealed to the district court, where the complaint was dismissed. Held, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie. City of Miles City v. Drum, 60 M 451, 199 P 719.

Objection to Form of Appeal

Where defendant sought to appeal de-

cision of justice of peace and although undertaking was not in proper form, it was approved by the justice, it was improper for the district court to dismiss the appeal for insufficiency of form of undertaking when no objection to the form was made in the justice's court of original jurisdiction. Reidelbach v. District Court, 142 M 52, 381 P 2d 470; Clark v. District Court, 142 M 56, 381 P 2d 472.

Record on Appeal

In the absence of specific statutory provision on the subject, the original files, together with a copy of the docket minutes, constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court. In re Graye, 36 M 394, 397, 93 P 266.

The original files, together with a copy of the docket minutes, may be regarded as constituting the record on appeal from a justice of the peace to the district court. In re Graye, 36 M 394, 397, 93 P 266.

Trial de Novo

On appeal from a justice's court in a misdemeanor case, the cause must be tried de novo in the district court on the papers and files in the former, unless the latter court allows other or amended pleadings, and each party has the benefit of all legal objections made in the justice's court. State v. Benson, 91 M 109, 5 P 2d 1045.

The district court does not, on appeal from a police court, sit as a court of review, but it tries the cause de novo. Town of White Sulphur Springs v. Voise, 136 M 1, 343 P 2d 855, 857.

Undertaking

An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such requirement. State ex rel. Hodgdon v. District Court, 33 M 119, 122, 82 P 663.

Waiver of Irregularities

A party cannot, under the guise of an application for a trial de novo, insist that irregularities, to which he made no objection, shall be taken note of, or that the judgment, which is abrogated by the appeal, be reversed on account of them. It is therefore immaterial, on the trial of the case appealed, whether the justice lost jurisdiction by conducting the trial in part on a legal holiday, or failed to comply with the statute in giving judgment or pronouncing sentence. In re Graye, 36 M 394, 397, 93 P 266.

Collateral References

Criminal Law 260. 22 C.J.S. Criminal Law §§ 390, 392, 395,

4 Am. Jur. 2d 672 et seq., Appeal and Error, § 159 et seq.

DECISIONS UNDER FORMER LAW

Oral Notice of Appeal

An appeal may be taken by oral notice at the time of the rendition of the verdict or judgment. In re Graye, 36 M 394, 398, 93 P 266.

Former section permitting appeal by notice in open court did not apply to the taking of an appeal to the supreme court from a judgment of a district court. State ex rel. Treat v. District Court, 124 M 234, 221 P 2d 436, 437.

Trial de Novo

Defendant, who gave oral notice of appeal upon his conviction in a justice of the peace court of the offense of driving a vehicle on a highway while under the influence of intoxicating liquor, was entitled to a trial de novo in the district court. Wilson v. Brodie, 148 M 235, 419 P 2d 306, 309.

CHAPTER 21

POST-TRIAL MOTIONS

Section 95-2101. New trial.

- 95-2101. New trial. (a) Definition and Effect. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict or finding has been rendered and the granting of a new trial places the parties in the same position as if there had been no trial.
 - (b) Motion for a New Trial.
- (1) Following a verdict or finding of guilty the court may grant the defendant a new trial if required in the interest of justice.
- (2) The motion for a new trial shall be in writing and shall be filed by the defendant within thirty (30) days following a verdict or finding of guilty. Reasonable notice of the motion shall be served upon the state.
 - (3) The motion for a new trial shall specify the grounds therefor.
- (c) Alternative Authority of the Court on Hearing Motion for New Trial. On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:
 - 1. Deny the motion,
 - 2. Grant a new trial, or
- 3. Modify or change the verdict or finding by finding the defendant guilty of a lesser degree of the crime charged, finding the defendant guilty of a lesser included crime or finding the defendant not guilty.

History: En. 95-2101 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Subsection (b) (2) requires that the motion be made within thirty days following the entry of a finding or the return of a verdict. This limitation should be viewed in conjunction with the post-conviction remedies that are available.

Subsection (b) (3) provides that the motion for a new trial specify the grounds therefor. Some specific examples are: the trial of a felony charge in the absence of the defendant, jury misconduct, court error in the decision of any question of

law arising during trial, a verdict contrary to law or evidence or the discovery of new evidence. Affidavits are not required to support a motion for a new trial.

Source: Revised Codes of Montana 1947, sections 94-7601 and 94-7602; Illinois Code of Criminal Procedure, Chapter 38, section 116-1.

Cross-Reference

Error in instructions as ground for new trial, sec. 95-1910.

Appeal

Rulings upon the admission or rejection of testimony and upon giving or refusing instructions may be reviewed either upon appeal from the judgment or on appeal from an order refusing a new trial, but any other questions arising from this section may be reviewed only upon appeal from an order denying a new trial. State v. Brantingham, 66 M 1, 7, 8, 212 P 499.

Attacking Charge

When a first conviction is set aside the defendant is not precluded upon a remand for a new trial from attacking the indictment or information. State v. Hale, 129 M 449, 291 P 2d 229, 230, overruled on another point in 142 M 459, 462, 384 P 2d 749. (Dissenting opinion, 129 M 449, 291 P 2d 229, 236.)

Evidence Received out of Court

Under former statute providing that a new trial shall be granted "when the jury has received any evidence, papers, or documents, not authorized by the court," the word "papers" refers to such written instruments as might be competent testi mony when inspected by the court, and found to be competent under the rules of evidence, and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not, in itself, vitiate the verdict. State v. Jackson, 9 M 508, 520, 24 P 213.

Exhibits introduced in evidence in a prosecution for murder which are sent to the jury during their retirement will not be considered as having been received out of court, where it is found on motion for new trial that counsel for defendant consented to their being taken to the jury room during their retirement. State v. Allen, 23 M 118, 57 P 725.

Jury Separation or Misconduct

Under former statute providing that a new trial shall be granted "when the jury has been separated without leave of court, or been guilty of any misconduct, tending to prevent a fair and due consideration of the case," the reception by the jury of newspapers, containing comments on the trial adverse to the defendant, is misconduct tending to show injury to the defendant. State v. Jackson, 9 M 508, 522, 24 P 213. See also State v. Pepo, 23 M 473, 479, 59 P 721.

The affidavits of two jurors, filed in aid of a motion for new trial by defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court, which clearly charged the jury that they could find the accused guilty of any grade of unlawful homicide or acquit him, in that from a reading of them they were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that,

being unwilling to acquit, they voted for murder in the first degree rather than declare him innocent, did not show such misconduct on the part of the jury as to entitle defendant to a new trial. State v. Beeskove, 34 M 41, 51, 85 P 376.

Motion for New Trial after Appeal Perfected

Once an appeal has been perfected to the supreme court the district court loses jurisdiction of the case, except that if a motion for a new trial is then pending the district court retains jurisdiction thereof, with power to rule thereon. State v. Nicks, 131 M 567, 312 P 2d 519, 520.

Newly Discovered Evidence

An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence," that expression meaning evidence discovered since the trial. State v. Prouty, 60 M 310, 315, 199 P 281.

Though a motion for a new trial in a criminal cause on the ground of newly discovered evidence is not generally viewed with favor by the courts, it is authorized by the codes, and, when the prescribed conditions are met, entitled to the same consideration as a motion upon any other statutory ground, and while a broad discretion is lodged in the trial court in disposing of it, its order denying it is subject to review. State v. Gangner, 73 M 187, 190, 235 P 703.

Alleged newly discovered evidence which is cumulative only does not warrant the granting of a new trial; nor may the court be put in error for refusing a retrial on that ground where movant made no attempt to show due diligence on his part to produce the newly discovered witness on the trial of his case. State v. Gies, 77 M 62, 64, 249 P 573.

Where the owner of an animal which defendant was charged with stealing testified that it was his property at the time it was taken and remained so until after defendant's arrest when it was paid for by the latter, he being fully cross-examined as to the transaction, a motion for a new trial on the ground of newly discovered evidence based upon the witness' affidavit to the effect that he was mistaken in so testifying, was properly refused, since a new trial will not be granted because of newly discovered evidence based on forgetfulness or unfamiliarity of defendant's counsel with facts within the knowledge of the witness, or to enable the witness, on a change of heart, to give testimony

in excuse of defendant's conduct. State v. Hughes, 78 M 87, 89, 252 P 320.

Where no evidence of the fitness or unfitness of the parents of an accused delinquent minor to control or take care of him was heard by the court, a judgment that they were not unfit was unsupported by the evidence and refusal of a new trial on the ground of new evidence was error. State ex rel. Palagi v. Freeman, 81 M 132, 139, 262 P 168.

Where defendant and his counsel accepted the statement of the county attorney that a witness, then in the county jail, whose name was endorsed on the information had refused to testify, whereas after the trial they ascertained that if he had been called he would have testified that he and another committed the offense for which defendant was convicted, without verifying the prosecutor's statement by an interview with the witness, they were lacking in due diligence in discovering and producing the alleged newly discovered evidence, preventing reversal of the order denying retrial as an abuse of discretion. State v. Broell, 87 M 284, 287, 286 P 1108.

Applications for new trials on the ground of newly discovered evidence are not favored by the courts and will not be granted where the new evidence is merely cumulative; in passing upon the correctness of a new trial order the supreme court sits only as a reviewing tribunal, not as a court of original jurisdiction or one clothed with authority to try the motion de novo. State v. Broell, 87 M 284, 287, 286 P 1108.

Where newly discovered evidence may demonstrate perjury in the state's witness upon whose evidence the verdict of guilty was founded and, but for which, conviction could not have been had, and may probably produce a different result, a new trial should be granted on that ground. State v. Hamilton, 87 M 353, 368, 287 P 933.

Motions for new trials on the ground of newly discovered evidence in criminal cases are not favored, and, regardless of the facts set up in affidavits filed in support thereof, defendant is not entitled to a retrial unless it is shown that he could not, with reasonable diligence, have discovered and produced the new evidence at the trial. State v. Hamilton, 87 M 353, 386, 287 P 933.

Where the key witness at the trial in which defendant was convicted of larceny made statements after the trial demonstrating that the testimony he gave was false and perjurious and, at the hearing on defendant's motion for new trial, the witness refused to give any testimony, the requirements for the granting of a new

trial on the ground of newly discovered evidence were met and the defendant should have been granted a new trial. State v. Greeno, 135 M 580, 342 P 2d 1052.

Where defendant had perfected an appeal to the supreme court, and then discovered new evidence, the supreme court had no jurisdiction to grant a new trial, but upon defendant's prima facie showing of matters sufficient to warrant consideration, the court would instruct the district court to entertain defendant's motion for a new trial, and would stay further proceedings pending such motion. State v. Nicks, 131 M 567, 312 P 2d 519, 521.

New Trial Not Double Jeopardy

Where one convicted of crime is granted a new trial he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had. State v. Aus, 105 M 82, 86, 69 P 2d 584.

Notice of Motion

The notice of motion for a new trial in a criminal case need not state whether the motion will be based on affidavits or a bill of exceptions; and the statement therein of the grounds on which the motion will be made is notice of what will be the basis of the motion. State v. Landry, 29 M 218, 220, 74 P 418.

On Confession of Error by Attorney General

Conviction of one of the crime of first degree burglary set aside and cause remanded for new trial for error committed by the trial court, confessed by the attorney general and shown by the record, in refusing defendant's motion for retrial based on the ground that a juror was biased and prejudiced. State v. Summers, 107 M 34, 36, 79 P 2d 560.

Supreme Court's Status

Upon appeal from an order granting or denying a motion for a new trial, the supreme court sits as a court of error and review, not as a court of original jurisdiction, or as an appellate court that is clothed with authority to try the motion de novo. State v. Schoenborn, 55 M 517, 520, 179 P 294.

Verdict Contrary to Law or Evidence

An alleged error in an instruction will not be reviewed on appeal where the only ground designated is that the verdict is contrary to law and evidence. State v. Gawith, 19 M 48, 47 P 207, overruled in State v. Mason, 24 M 340, 346, 61 P 861.

State v. Mason, 24 M 340, 346, 61 P 861.
Under former statute providing that when verdict is contrary to law or evidence but evidence shows accused to be guilty only of lesser degree or lesser in-

cluded offense rather than degree of which he was convicted, court may modify judgment without granting new trial, the expression, "the verdict is contrary to the evidence," meant the same thing as the expression, "insufficiency of the evidence to justify the verdict." Flaherty v. Butte Electric Ry. Co., 42 M 89, 93, 111 P 348; State v. Schoenborn, 55 M 517, 520, 179 P 294.

A defendant in a criminal case who has been convicted is not required to show an entire absence of evidence of some fact necessary to make out a case, in order to secure a new trial; but if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. State v. Schoenborn, 55 M 517, 520, 179 P 294.

The district court has authority to grant a motion for a new trial upon the ground that the verdict is contrary to the evidence without reference to the fact that a different judge may preside at the hearing of the motion, from the one who presided at the trial. State v. Schoenborn, 55 M 517, 520, 179 P 294.

A motion for a new trial in a criminal case upon the ground that the verdict is contrary to the law and the evidence presents for the court's determination the question of the sufficiency of the evidence to sustain the verdict. State v. Hughes, 76 M 421, 424, 246 P 959.

Failure of defendant to object to instructions on first degree murder does not deprive him of the right to ask for a new trial on the ground that the evidence did not justify a verdict of murder in that degree, the expression in former statute authorizing a new trial "when the verdict is contrary to the evidence" meaning the same thing as insufficiency of the evidence to justify the verdict, and the section not contemplating that defendant must first make objection to such instructions before he may rely upon the insufficiency of the evidence as a ground for a new trial. State v. Gunn, 85 M 553, 561, 281 P 757.

Verdict Improperly Arrived At

Under former statute providing for new trial when verdict has been decided by lot or by any means other than a fair expression of opinion on part of all jurors, the fact that a juror, when sworn, was biased and prejudiced against the defendant, which fact he concealed upon his voir dire examination, and which neither defendant nor his counsel discovered until after verdict, was ground for a new trial. State v. Mott, 29 M 292, 295, 74 P 728.

While it is imperative that the accused shall have a trial by an impartial jury, nevertheless, after verdict, error will not be presumed, and it is incumbent on the accused to make it appear affirmatively that he is entitled to a new trial by reason of having been deprived of this constitutional right; mere possibility, or even probability, that one of the jurors was incompetent, is not sufficient to overthrow the verdiet. State v. Mott, 29 M 292, 295, 74 P 728.

The fact that jurors may impeach their own verdict when it has been decided by lot excludes all other exceptions to the general rule that jurors will not be heard to impeach their own verdict. State v. Beeskove, 34 M 41, 51, 85 P 376; State v. O'Brien, 35 M 482, 503, 90 P 514; Sutton v. Lowry, 39 M 462, 471, 104 P 545; State v. Wakely, 43 M 427, 437, 117 P 95; State v. Lewis, 52 M 495, 504, 159 P 415.

Except in cases where it has been reached by means other than a fair expression of opinion by all the jurors, their verdict cannot be impeached by the affidavit of one or more of the individuals composing the jury. State v. Lewis, 52 M 495, 504, 159 P 415.

In a prosecution for statutory rape, there was no error where the jury reached a verdict of guilty, and then, in deciding on punishment, each member set down his proposed amount in years, the total was divided by twelve to get an average, and then the term of the punishment was fixed after further discussion. State v. Moorman, 133 M 148, 321 P 2d 236, 242.

A quotient verdict is not a lot verdict. State v. Moorman, 133 M 148, 321 P 2d 236, 243.

When Assignment of Error Does Not Merit Consideration—No Record, Not Argued

Where alleged error in denying defendant's motion for new trial was not argued and nothing appeared in the record to sustain it, the assignment does not merit consideration. State v. Wong Sun, 114 M 185, 199, 133 P 2d 761.

Collateral References

Criminal Law 905, 913 et seq., 949, 965.

24 C.J.S. Criminal Law § 1418 et seq. 39 Am. Jur., New Trial, p. 33, § 2; p. 50 et seq., § 26 et seq.; p. 181 et seq., § 177 et seq.; p. 187 et seq., § 186 et seq.

Abuse of witness by counsel as ground for new trial. 4 ALR 414.

Motion for new trial as remedy of one convicted of crime while insane. 10 ALR 215 and 121 ALR 269.

Inability to perfect record for appeal as ground for new trial. 13 ALR 102; 16 ALR 1158; 107 ALR 603 and 19 ALR 2d 1098.

Homicide, new trial for instruction as to lesser degree of, in absence of evidence supporting charge of such degree. 21 ALR 603; 27 ALR 1097 and 102 ALR 1019

Communications between jurors and others as ground for new trial in criminal case. 22 ALR 254; 34 ALR 103 and 62 ALR 1466.

New trial on ground of newly discovered evidence which court has jurisdiction to determine motion for, pending appeal or after affirmance of conviction. 27 ALR 1091.

Counsel's appeal in criminal case to selfinterest of jurors as taxpayers, as ground for new trial. 33 ALR 459.

for new trial. 33 ALR 459.

New trial because of confession of the crime by witness after criminal trial. 33 ALR 557 and 158 ALR 1073.

Jury list in criminal case, new trial because of exclusion of eligible class of persons from. 52 ALR 930.

Incriminating statements not in evidence, statement by prosecuting attorney in presence of jury, implying that defendant had made to him. 52 ALR 1022.

Relationship disqualifying juror but unknown to him as ground for new trial in criminal case. 116 ALR 679.

Privileged testimony, comment on accused's failure to offer, or refusal to permit introduction of, or to permit privileged witness to testify. 116 ALR 1175.

Punishment, comment by prosecuting attorney regarding jury's right or privilege to recommend or fix. 120 ALR 502.

Statements or arguments by prosecuting attorney calculated to give jury impression that court believed defendant guilty as ground for new trial. 127 ALR 357.

Perjury, statement or comment by counsel regarding, as ground for new trial. 127 ALR 1415.

Voluntary statements damaging to accused, not proper subject of testimony, uttered by a testifying police or peace officer, as ground for granting a new trial. 8 ALR 2d 1013.

Deafness of juror as ground for new trial. 15 ALR 2d 534.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial. 28 ALR 2d 972.

Prejudicial effect of argument that adversary was attempting to suppress facts. 29 ALR 2d 996.

Juror's reading of newspaper account of trial in criminal case during its progress as ground for new trial. 31 ALR 2d 417.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 32 ALR 2d 358. Absence of judge from courtroom during criminal trial up to time of reception of verdict as ground for new trial, 34 ALR 2d 683.

Prejudicial effect of argument or comment that accused, if acquitted on grounds of insanity, would be released from institution to which committed. 44 ALR 2d 978.

Counsel's appeal in criminal case to racial, national, or religious prejudice as ground for new trial. 45 ALR 2d 303.

Manifestations of grief, crying, and the like by victim or family of victim during criminal trial as ground for new trial. 46 ALR 2d 949.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 46 ALR 2d 1423.

Juror's pretrial statement favoring death penalty as ground for new trial. 48 ALR 2d 580.

Prejudicial effect of prosecuting attorney's argument or disclosure during trial that another defendant has been convicted or has pleaded guilty. 48 ALR 2d 1016.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness. 49 ALR 2d 1247.

Attorney's argument to jury indicating his belief or knowledge as to guilt of accused, propriety and effect of. 50 ALR 2d 766.

Prejudicial effect of jury's procurement or use of lawbook during deliberations. 54 ALR 2d 710.

Prejudicial effect of jury's procurement or use of books other than lawbook during deliberations. 54 ALR 2d 738.

Prejudicial effect of counsel's addressing individually or by name particular juror during argument. 55 ALR 2d 1198.

Evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, admissibility and effect. 58 ALR 2d 556.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial. 62 ALR 2d 166.

Prosecutor's statement that if jury makes mistake in convicting it can be corrected by other authorities, prejudicial effect. 3 ALR 3d 1448.

Court's statement that if jury makes mistake in convicting it can be corrected by other authorities, prejudicial effect. 5 ALR 3d 975.

Communications between witnesses and jurors, prejudicial effect, in criminal case, of. 9 ALR 3d 1275.

Parole or pardon, prejudicial effect of statement or instruction of court as to possibility of. 12 ALR 3d 832.

Increased punishment on new trial for same offense, propriety of. 12 ALR 3d 978.

Parole, prejudicial effect of statement of prosecutor as to possibility of pardon or. 16 ALR 3d 1137.

DECISIONS UNDER FORMER LAW

Grounds for New Trial

Under former statute specifically enumerating grounds for new trial, held that where a motion to set aside an information was made in the trial court, on the ground that it was not properly subscribed by the county attorney, and improperly refused, the error could be reviewed only on appeal from the judgment; it could not be reviewed on an appeal from an order granting a new trial, not being one of the enumerated grounds. State v. Schnepel, 23 M 523, 528, 59 P 927.

Where a defendant convicted of crime bases his motion for a new trial upon a number of the statutory grounds therefor, he has an absolute right to have all the grounds specified passed upon by the trial court; if it fails to do so but grants a new trial upon a ground not sustained on appeal by the state, the order will be reversed with directions to pass upon the motion in its entirety. State v. Hughes, 76 M 421, 424, 246 P 959.

Newly Discovered Evidence

Under former section authorizing new trial on ground of newly discovered evidence and requiring affidavits in support of such motion, a new trial would not be granted when the persons from whom the evidence was expected declined to make affidavits. State v. Gaimos, 53 M 118, 128, 162 P 596.

An affidavit of one of defendant's attorneys in support of a motion for new trial, asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose testimony would tend to contradict the state's witnesses or corroborate appellant's version of the affray "and presented same upon the trial," was insufficient to

show abuse of the court's discretion in denying the motion. State v. Prlja, 57 M 461, 189 P 64.

Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient. State v. Prouty, 60 M 310, 315, 199 P 281.

To constitute a showing of due diligence in discovering new evidence in a criminal case to warrant the granting of a new trial, movant is not required to allege in his supporting affidavits that he made inquiry of every person residing in the town in which the crime of which he was convicted was committed, some seventyfive miles from the county seat, by telephone or telegraph, as to whether they knew anything concerning the case. State v. Hamilton, 87 M 353, 368, 287 P 933. Failure of trial court to grant motion

for new trial in first degree murder case on alleged newly discovered evidence was not reversible error where counteraffidavit by county attorney showed that his office investigated each of the people named in the affidavits and that each of the parties denied that they had any evidence or information relative to the case. State v. Cor, 144 M 323, 396 P 2d 86, 101. (Dissenting opinion, 144 M 323, 353, 396 P 2d 86,

Timeliness of Supplemental Motion

A supplemental motion for a new trial on the ground of newly discovered evidence is timely and properly before the court if made while the original motion remains undetermined when the applicant shows by affidavit that it was filed within thirty days after discovery of the alleged new evidence. State v. Hughes, 78 M 87, 89, 252 P 320.

CHAPTER 22

SENTENCE AND JUDGMENT

Section 95-2201. Liberal construction. Sentence and judgment. 95-2202. 95-2203. Presentence investigations. 95-2204. Content of investigation. 95-2205. Availability of the report to defendant and others. 95-2206. Sentence. 95-2207. Withdrawal of plea on a deferred imposition. 95-2208. Judgment to pay fine constitutes a lien. 95-2209. Entry of judgment and judgment roll. 95-2210. Information from courts. 95-2211. Review of sentence.

95-2212. Sentence to be imposed by judge.

95-2213. Merger of sentences. 95-2214.

Credit for time served. 95-2215. Credit for incarceration prior to conviction.

95-2216. Jail work release program.

95-2217. Prisoner furlough program—purpose and intent.

95-2218. Definitions.

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95-2220.

Application for participation in furlough program.

Consideration of application—furlough plan—consent of sheriff neces-95-2221.

95-2222. Disposition of prisoner's earnings-trust fund-schooling costs.

95-2223. Administrative rules—co-operation by state agencies.

95-2224. Prisoner not agent, employee or involuntary servant of warden or sheriff.

95-2225. Eligibility for parole unaffected.

95-2226. Sheriff's responsibility—cancellation or revocation of furlough.

95-2201. Liberal construction. This chapter shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual.

History: En. 95-2201 by Sec. 1, Ch. 196, L. 1967.

Source: Model Sentencing Act, section 1.

Law Review

Ramifications of Jail-Based Probation Upon Suspended Imposition of Sentence (Petition of Joseph Williams, 145 M 45, 399 P 2d 732), 27 Mont. L. Rev. 98 (1965).

95-2202. Sentence and judgment. (a) The judgment shall be rendered in open court.

- (b) If the verdict or finding is not guilty judgment shall be rendered immediately and the defendant shall be discharged from custody or from the obligation of his bail bond.
- (c) If the verdict or finding is guilty sentence shall be pronounced and judgment rendered within a reasonable time.

History: En. 95-2202 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure. Chapter 38, section 118-1.

Delay Due to Motions of Defendant-Nonprejudice

While ordinarily the trial court in a criminal case should pass judgment without delay, other than that provided by former statute, and in the absence of statute declaring that sentence must be pronounced at the same term of court at which the verdict of guilty is returned, where the verdict was returned on Nov. 18, 1938, and sentence was not pronounced until Jan. 19, 1939, the delay being caused by defendant's motions in arrest of judgment and for new trial and the hearings thereof, complaint may not be made that the court lost jurisdiction, or judgment not pronounced in the trial term. State v. Heaston, 109 M 303, 309, 97 P 2d 330.

Collateral References

§ 525 et seq.

Criminal Law 977 (3). 24 C.J.S. Criminal Law § 1564. Judgment and sentence, generally, 21 Am. Jur. 2d 509 et seq., Criminal Law,

DECISIONS UNDER FORMER LAW

Record of Arraignment

Record of arraignment was required to show that the former provisions as to the period of time between plea and sentence

had been complied with. State ex rel. Biebinger v. Ellsworth, 147 M 512, 415 P 2d

Time for Judgment

Former section providing, inter alia, for pronouncing judgment in felony cases at least two days after verdict meant that the defendant was entitled to two days after the verdict was returned before judgment was pronounced, provided the term of court lasted that long; but, if the term was not to continue for two days after the verdict was returned then the time for pronouncing judgment should be postponed to a date as remote as can reasonably be fixed within the then current term of court. State v. Lu Sing, 34 M 31, 40, 85 P 521.

When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment, it was presumed on appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced. State v. Lu Sing, 34 M 31, 40, 85 P 521.

Method pursued by trial judge, in passing sentence and rendering judgment in a prosecution for illegally manufacturing and illegally possessing intoxicating liquor where defendant was guilty upon both counts and waived the statutory time for pronouncing judgment and sentence, examined, held to have been in faultless adherence to the provisions of the code sections and not open to the objection that no judgment was ever made or entered and all that was done was an entry by the clerk in the minute book that the court did certain things. State v. Sorenson, 75 M 30, 34, 241 P 616.

Failure of court to wait two days after verdict before imposing sentence as required by former statute, was ground for setting aside conviction, and annulling plea of guilty. Harding v. State, 149 M 147, 424 P 2d 130

95-2203. Presentence investigations. No defendant convicted of a crime which may result in commitment for one (1) year or more in the state prison, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court, unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense.

History: En. 95-2203 by Sec. 1, Ch. 196, L. 1967.

Source: Model Sentencing Act, section 2.

Reading into Record

Trial court did not err in considering and in reading into the record in open court prior events of eighteen-year-old defendant's life as disclosed by his juvenile record under statute directing judge to have a written report by the probation officer or parole officer and to consider the same before sentencing a defendant, since defendant did not object to the reading into the record and since after reading

into the record the judge had asked "Is there any legal excuse why judgment and sentence of court should not be pronounced against you?" State v. Manning, 149 M 517, 429 P 2d 625.

Report of Investigator

Where trial judge requested pre-sentence investigation, unsworn representations and recommendations set forth in investigator's unsigned report privately offered to and privately received and adopted by the trial judge were not evidence, Kuhl v. District Court, 139 M 536, 366 P 2d 347, 364.

DECISIONS UNDER FORMER LAW

Discretion of Trial Court

Trial court did not have discretion to determine for itself whether former provisions dealing with testimony as to circumstances in aggravation or mitigation of punishment should be applied. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 359.

Examination of Witnesses in Open Court

Where defendant pleaded guilty to grand larceny, the extent of his punishment should have been determined by the exercise of a sound discretion on the part of the trial judge after the circumstances had been "presented by the testimony of witnesses examined in open court." Kuhl v. District Court, 139 M 536, 366 P 2d 347, 351.

95-2204. Content of investigation. Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.

History: En. 95-2204 by Sec. 1, Ch. 196, Source: Model Sentencing Act, section 3. L. 1967.

95-2205. Availability of the report to defendant and others. The judge may, in his discretion, make the investigation report or parts of it available to the defendants or others, while concealing the identity of persons who provided confidential information. If the court discloses the identity of persons who provided information, the judge may, in his discretion, allow the defendant to cross-examine those who rendered information. Such reports shall be part of the record but shall be sealed and opened only on order of the court.

If a defendant is committed to a state institution the investigation report shall be sent to the institution at the time of commitment.

History: En. 95-2205 by Sec. 1, Ch. 196, L. 1967.

Source: Model Sentencing Act, section 4.

Examination of Witnesses in Open Court

The sentence of a defendant, who pleaded guilty to grand larceny, to four years in the state prison was reduced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant

or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 365.

If and when the trial judge requests a written report of investigation, he must be governed by statutes relating to such reports. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 363.

95-2206. Sentence. Whenever any person has been found guilty of a crime or offense upon a verdict or plea the court may impose any of the following sentences:

- (1) Release the defendant on probation;
- (2) Defer the imposition of sentence for a period not to exceed three (3) years;
- (3) Suspend the execution of the sentence up to the maximum sentence allowed for the particular offense. However, if any restrictions or conditions are violated, any elapsed time shall not be a credit against the sentence, unless the court shall otherwise order.
 - (4) Impose a fine as provided by law for the offense;
- (5) Commit the defendant to a correctional institution with or without a fine as provided by law for the offense;
- (6) Impose any combination of the above. The court may also impose any restrictions or conditions on the above sentences which it deems necessary.

Any judge who has suspended the execution of a sentence or deferred the imposition of a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence or deferred imposition of sentence to revoke such suspension or impose sentence and order such person committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of pardons as provided by law, or retain such jurisdiction with this court. Prior to the revocation of an order suspending or deferring the imposition of sentence, the person affected shall be given a hearing.

History: En. 95-2206 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Subsection (2) was principally designed for the benefit of a young offender who has no previous criminal record but may be desirable in other cases.

Under subsection (3) the judge may give credit for elapsed time if he feels this to be an incentive for better behavior.

The conditions which may be imposed are left entirely to the imagination of the individual judge. It is contemplated that conditions will be imposed which are for the benefit of the individual, and which can be fairly met. An example would be jail-basing of the sentenced individual for a specified period of time, or other limitations on his daily life which are in keeping with the individual's particular needs in adjusting to his environment.

Floating—Sentence To Leave County— Void as Attempted Exercise of Pardoning Power

The provision of suspending sentence on condition that defendant leave and remain out of county has no force or effect other than to suspend sentence, and court has no power to pronounce a sentence in the absence of specific statutory authority. The prisoner is, by law, subject only to the rules and regulations of state board of pardons, and floating is void as an attempted exercise of pardoning power. Exparte Sheehan, 100 M 244, 255, 49 P 2d 438.

Jury May Not Suspend Sentence

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation. State v. Simanton, 100 M 292, 310, 49 P 2d 981, overruled on other grounds in State v. Knox, 119 M 449, 453, 175 P 2d 774.

Justice Courts

Provisions of former act were clearly

applicable to all persons prosecuted for public offenses in justice courts as well as district courts, irrespective of the fact that section appeared in portion of code dealing with district courts, and although a justice of the peace has no clerk as referred to in former sections, he may get blanks from the clerk of district court. Ex parte Sheehan, 100 M 244, 251, 255, 49 P 2d 438.

Revocation of Suspension

Where relator was sentenced to four years' confinement and the execution of the sentence was then suspended which suspension was later revoked, the sentence commenced to run for all purposes on the date when judgment of conviction was entered. Any time between imposition of suspended sentence and its revocation should have been credited to relator and failure to do so resulted in his illegal confinement. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P 2d 442.

Subsequent Imprisonment

Where order placing petitioner on probation provided that he would be "jailbased" and referred to him as a "prisoner," the substance of the order and not its form or descriptive terminology determined its effect and meaning so that subsequent imprisonment did not place petitioner in double jeopardy in violation of the federal constitution or section 18, article III of the Montana constitution. In re Williams' Petition, 145 M 45, 399 P 2d 732.

Suspended Sentence, Effect Of

The effect of an order of the district court suspending the sentence of one convicted of a misdemeanor is to place him under the control and management of the state board of prison commissioners and subject to such rules and regulations as it may see fit to make. State ex rel. Foot v. District Court, 72 M 374, 377, 233 P 957.

Suspension of Sentence

Assuming that the court had the power to suspend the execution of accused's sentence and to place him upon probation, that power, too, must have been exer-

cised at the time the sentence was pronounced. When an order suspending sentence is made, it is, in effect, a part of the judgment itself. It is the court's di-rection as to how the judgment shall be carried into effect. State ex rel. Reid v. District Court, 68 M 309, 310, 311, 218 P 558.

Under former section, the district court had authority to suspend sentence and place the defendant on probation whether found guilty of a crime or a misdemeanor. State ex rel. Foot v. District Court, 72 M

374, 377, 233 P 957.

Order of suspension must be made before the defendant is committed to the institution wherein he is to serve his sen-

tence. State ex rel. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525. The statute providing for the suspen-sion of sentences in criminal actions is designed to afford first offenders an opportunity for reformation and should be liberally construed. State ex rel. Bottomly v. District Court, 73 M 541, 543, 237 P 525.

Defendant was convicted of a violation of the liquor law and sentenced to serve sixty days in jail and pay a fine. He at once perfected an appeal, secured a certificate of probable cause and was admitted to bail. Five months thereafter his appeal was dismissed and the trial court on the day the certificate of dismissal was received suspended his sentence. Held, on application for writ of supervisory control, that defendant never having been committed, the court could properly, after entry of judgment, suspend the sentence at the time it did. State ex rel. Bottomly v. District Court, 73 M 541, 543, 237 P 525.

When Motion To Change Plea to Not Guilty Property Denied

Where defendant pleaded guilty on two charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, alleging in his affidavit that he pleaded on advice of his attorney, and was unaware of the effect of former section requiring consecutive terms if person had been convicted of two or more offenses before sentence had been pronounced for

either held, that the evidence was sufficient to deny the motions, that the court did not abuse its discretion in finding him sane when he pled, that he was faithfully represented, and that he was aware that he couldn't escape jury trial and possible death sentence if he had done otherwise. State v. Hukoveh, 115 M 125, 131, 139 P 2d 538.

Collateral References

Criminal Law 1001. 24 C.J.S. Criminal Law §§ 1607 et seq., 1613, 1615, 1618, 1995. 21 Am. Jur. 2d 527 et seq., Criminal

Law, § 552 et seq.

Constitutionality of statute conferring on court power to suspend sentence. 26 ALR 399 and 101 ALR 1402.

Second offense, effect of suspending sentence on finality of conviction for purpose of enhancing punishment. 58 ALR 44; 82 ALR 360; 116 ALR 222; 132 ALR 101 and 139 ALR 681.

Effect of court's attempt to fix the beginning or end of period of imprison-

ment. 69 ALR 1177.

Suspension of sentence on condition of leaving state or locality. 70 ALR 100.

Pardon or parole, suspension of sentence or discharge, as affecting fine or penalty imposed in addition to imprisonment. 74 ALR 1118.

Are sentences on different counts to be regarded as for a single term or for separate terms as regards suspension of sentence. 107 ALR 634.

Convicted person's acceptance of provision, parole, or suspension of sentence as waiver of right to appeal. 117 ALR 929.

Imposition or enforcement of sentence which has been suspended without au-

thority. 141 ALR 1225.
Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for remainder of term. 147 ALR

What constitutes commencement of service of sentence, depriving court of power to change sentence. 159 ALR 161.

Notice and hearing before revocation of probation or suspension of sentence, parole, conditional pardon, or probation, right to. 29 ALR 2d 1074.

DECISIONS UNDER FORMER LAW

Repealed by Implication

Former chapter governing suspension of sentences repealed by implication former section governing when term of imprisonment commences, as far as any application to suspended sentence was concerned. State ex rel. Wetzel v. Ellsworth, 143 M 54, 387 P 2d 442.

95-2207. Withdrawal of plea on a deferred imposition. Whenever the court has deferred the imposition of sentence, and after termination of the time period during which imposition of sentence has been deferred upon motion of the court, the defendant or the defendant's attorney, the court may allow the defendant to withdraw his plea of guilty, or may strike the verdict of guilty from the record, and order that the charge or charges against him be dismissed.

History: En. 95-2207 by Sec. 1, Ch. 196, L. 1967.

95-2208. Judgment to pay fine constitutes a lien. The judgment shall be reduced to writing and signed by the judge. A judgment that the defendant pay a fine or costs constitutes a lien upon the real estate of the defendant, which lien dates from the date of the defendant's arrest.

History: En. 95-2208 by Sec. 1, Ch. 196,

Source: Revised Codes of Montana 1947, section 94-7819.

Constitutionality

A former statute, containing substantially similar provisions, held constitutional. Silver Bow County v. Strumbaugh, 9 M 81, 22 P 453.

Collateral References

Fines@3. 36 C.J.S. Fines § 15.

95-2209. Entry of judgment and judgment roll. When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of prior convictions (if any), and must, within five (5) days, annex together and file the following papers, which will constitute the judgment roll:

- (1) The indictment or information and a copy of the minutes of the arraignment, pleas and motions.
 - (2) A copy of the minutes of the trial.
 - The instructions given or refused and the endorsements thereon.
 - A copy of the judgment.

History: En. 95-2209 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7820.

Appeal Record

Under former subdivision similar to subdivision (1) except that no provision was made for inclusion of copy of min-utes of arraignment and under former provision for settlement of bills of exceptions, the original and first amended information, and demurrers to them which were sustained, and a motion to dismiss the prosecution, and order overruling it, were not part of the appeal record where they were not embodied in the bill of exceptions. State v. Stickney, 29 M 523, 526,

The "record of the action" in a criminal case cannot be brought up on appeal in the body of a bill of exceptions. State v. Morrison, 34 M 75, 79, 85 P 738.

The merits of an appeal in a criminal

case will not be considered where the

papers constituting the record are included in a bill of exceptions and not certified as the record nor identified in any way by the certificate of the clerk of the district court or the trial judge. State v. Farriss, 34 M 424, 425, 87 P 177.

The record on appeal in a criminal case must, among other things, contain the judgment roll in which must be included a copy of the judgment. The state, on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the information and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. State v. Nilan, 75 M 397, 400, 243 P 1081.

Copy of Order Constituting Judgment

An appeal by the state in a criminal prosecution from an order made at the close of the state's case in chief, directing the jury to return a verdict in favor of defendant, was not subject to dismissal on the ground that the record on appeal did not contain a copy of the judgment where it did contain a copy of the order which had all the attributes of a judgment and constituted the judgment. State v. Thierfelder, 114 M 104, 108, 132 P 2d 1035, overruled on other grounds in State v. Labbitt, 117 M 26, 35, 156 P 2d 163.

Failure to State Degree Not Fatal

A judgment is not rendered invalid for failure to state the degree of the crime for which defendant was convicted. State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 222.

Judgment Roll

Held, that while the trial court erred in permitting the state on a perjury trial to introduce the judgment roll in the cause in which the alleged false testimony was given, containing papers not properly part thereof under statute, the procedure amounted to a mere irregularity which

could not in any manner have prejudiced the defendant. State v. Jackson, 88 M 420, 429, 293 P 309.

Where Record on Appeal Contained Requirements

On appeal from order sustaining demurrer to information, record consisting of information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of clerk of court was held sufficient; no bill of exceptions was necessary since no exception was required to ruling on demurrer. State v. Safeway Stores, Inc., 106 M 182, 197, 76 P 2d 81.

Where Statement of Degree of Offense Unnecessary

Since there was no indeterminate sentence legislation at the time of this conviction, it was not necessary to state in the judgment the degree of burglary of which the defendant was convicted. State v. Hill, 46 M 24, 126 P 41.

Collateral References

Criminal Law 994 (1). 24 C.J.S. Criminal Law §§ 1595, 1596. 21 Am. Jur. 2d 332, Criminal Law, § 306.

95-2210. Information from courts. It shall be the duty of the court disposing of any criminal case to cause to be transmitted to the board of pardons statistical data in accordance with regulations issued by the board regarding all dispositions of defendants whether found guilty or discharged.

History: En. 95-2210 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-7833.

95-2211. Review of sentence. Every sentence shall be subject to review in accordance with chapter 25, review of sentence.

History: En. 95-2211 by Sec. 1, Ch. 196, L. 1967.

95-2212. Sentence to be imposed by judge. All sentences under this chapter shall be imposed exclusively by the judge of the court.

History: En. 95-2212 by Sec. 1, Ch. 196, L. 1967.

Source: Model Sentencing Act, section 12.

Correction of Error

An error made by the trial court in the imposition of sentence for crime may be

corrected by it. In re Lewis, 51 M 539, 154 P 713.

Collateral References

Criminal Law \$884. 23A C.J.S. Criminal Law \$1408. 21 Am. Jur. 2d 549, Criminal Law, \$586.

DECISIONS UNDER FORMER LAW

Assessment of Sentence by Jury

Except for judgments rendered upon guilty pleas, former section requiring court to assess punishment if jury did not do so or assessed an unauthorized punish-

ment was applicable only where jury had made every finding necessary to enable them to fix the punishment, but could not agree upon the extent of it within the limitations prescribed by the statutes. In such cases, if they failed or neglected to fix it, the court might declare it, but not otherwise. State v. Mish, 36 M 168, 177, 92 P 459.

The jury returned the following verdict: "We, the jury in the above-entitled action, find the defendant, Louis L. Fowler, guilty of the crime of sedition in the manner and form as charged in the information and fix and assess his punishment at the discreation of the court." The contention is made that it is rendered so defective by the misspelling of the word "discretion" that judgment should not be rendered upon it. There can be no doubt what the jury intended, viz., to find the defendant guilty as charged, and to leave the punishment to be fixed by the court. Former section authorized that to be done. If it be conceded, however, that the latter part of the verdict is unintelligible, this may be omitted entirely, leaving a categorical finding of guilty of the crime as charged in the information. Under former statute it was the duty of the court to eliminate that part of the verdict and to assess the punishment which in its discretion it thought proper, within the limits prescribed by the statute. (In re Collins, 51 M 215, 152 P 40; In re Gomez, 52 M 189, 156 P 1078.) State v. Fowler, 59 M 346, 355, 196 P 992.

Former statute empowering the trial judge to assess the punishment, when the jury had failed to agree thereon, though convicting the accused party, applied also when the attempt by the jury to fix the punishment was rendered unsuccessful by its omitting the minimum, after stating the maximum, number of years it would have the party imprisoned. In re Gomez, 52 M 189, 191, 156 P 1078.

Complaint was made of the verdict and of the judgment entered thereon, because the verdict rendered on the first and third counts purported to fix the punishment for each "at thirty days," without specifying where the time should be served. No objection was made by the defendant to the verdict at the time of its rendition, and the court was not requested to send the jury out again, under proper instructions, to supply the omission, if there were any. Therefore, whether a verdict in this form is in itself sufficient was not considered in view of former section and the holding of this court in In re Gomez, 52 M 189, 156 P 1078. State v. Marchindo, 65 M 431, 457, 211 P 1093.

Held, on certiorari, that the power given the district court to reduce the extent of punishment fixed by the jury in a criminal prosecution, must be exercised prior to or at the time judgment is pronounced, and that therefore an order reducing a fine and jail sentence after the judgment had been in process of execution for a number of days was void as in excess of jurisdiction, and an encroachment upon the pardoning power reposed by the constitution in the governor and the state pardoning board. State ex rel. Reid v. District Court, 68 M 309, 311, 218 P 558.

Accused has right to have jury assess

Accused has right to have jury assess punishment upon a correct statement of the law as to the penalty prescribed for the offense, and therefore an instruction that the penalty for unlawfully possessing and transporting intoxicating liquor was a fine of not more than \$500, or imprisonment for not more than six months, or both such fine and imprisonment, whereas under section 11075, R. C. M. 1921, (since repealed) for the first offense a fine of not more than \$500 could be imposed, was prejudicially erroneous. State v. Miller, 69 M 1, 6, 220 P 97.

Under chapter 202, Laws of 1921, (section 3202, R. C. M. 1921, since repealed) the jury may fix the punishment by their verdict by a fine not exceeding \$1,000 or "by imprisonment for not more than three years, or by both such fine and imprisonment." The court instructed the jury that in case they found defendant guilty they must assess a fine of not less than \$500 nor more than \$3,000 and imprisonment for not less than one nor more than five years. Held, prejudicially erroneous. State v. Mark, 69 M 18, 27, 220 P 94.

In order to fix the punishment for the aggravated offense, it was indispensable that the jury know: (a) That prior convictions were charged and the nature of the offenses referred to in the charge; (b) that the charge was established by evidence or the admission of the defendant; and (c) what punishment was prescribed by law for the aggravated offense. To withhold from the jury all information concerning the charge of prior convictions would deny to the jury the right to fix the punishment and would, in effect, annul the provisions of former section. State v. O'Neill, 76 M 526, 533, 248 P 215.

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation State v. Simanton, 100 M 292, 310, 49 P 2d 981, overruled on other grounds in State v. Knox, 119 M 449, 453, 175 P 2d 774.

95-2213. Merger of sentences. (a) Unless the judge otherwise orders, (1) when a person serving a term of commitment imposed by a court in this

state is committed for another offense, the shorter term or shorter remaining term shall be merged in the other term, and (2) when a person under suspended sentence or on probation or parole for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence, probation, or parole shall be merged in any new sentence of commitment or probation.

- (b) The court merging the sentences shall forthwith furnish each of the other courts and penal institutions in which the defendant is confined under sentence with authenticated copies of its sentence, which shall cite the sentences being merged.
- (c) If an unexpired sentence is merged pursuant to subdivision (a), the court which imposed such sentence shall modify it in accordance with the effect of the merger.
- (d) Separate sentences of two (2) or more crimes shall run concurrently unless the court otherwise orders.

History: En. 95-2213 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The merger is not mandatory, but is in the discretion of the judge, although in most instances the merger should occur.

Sequence of Consecutive Sentences

Where petitioner was sentenced to serve consecutive sentences for escape and using an automobile without the consent of the owner, and the warden executed the sentences in a sequence reverse to that indicated by the court, there was no infringement on his rights and his petition for writ of habeas corpus was denied. Petition of Cheadle, 143 M 327, 389 P 2d 579.

Collateral References

Criminal Law ← 1216 (1). 24B C.J.S. Criminal Law § 1995. 21 Am. Jur. 2d 522 et seq., Criminal Law, § 547 et seq.

When sentences imposed by same court run concurrently or consecutively; and definiteness of direction with respect thereto. 70 ALR 1511.

Sentence for new offense committed while accused was at large on parole or conditional release as concurrent or consecutive. 116 ALR 811.

Sentences by different courts as concurrent. 57 ALR 2d 1410.

DECISIONS UNDER FORMER LAW

Consecutive or Concurrent Terms

Where defendant was sentenced to one year in prison on each of two counts of forgery without mention of whether the

sentences were to run concurrently or consecutively, defendant was required to serve consecutive terms. Hensley v. State, 144 M 507, 398 P 2d 69.

95-2214. Credit for time served. Where defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts. In calculating the time imprisoned, the person so convicted shall have the credit for all the time earned in diminution of sentence as provided under Montana statutes, section 80-1905, unless the sentencing authority in its discretion may choose to deny such credit.

History: En. 95-2214 by Sec. 1, Ch. 196, L. 1967.

Effect on Eligibility for Parole

Statute allows sentencing authority to deny credit for good time earned while serving prior modified or invalid sentence but does not authorize sentencing authority to provide that credit for time previously served should not be considered in determining eligibility for parole; thus one who served 157 days between arrest and conviction which was obtained under old code of criminal procedure and which was subsequently declared invalid was entitled to credit for that time upon

sentence subsequently imposed following conviction under new code, but stipulation that time served on prior sentence should not be considered for purposes of computing date of parole eligibility was unauthorized. State v. Zachmeier, — M—, 453 P 2d 783.

Where Applicable

Where habeas corpus was granted to petitioner who had served a considerable portion of his sentence and commitment

was set aside and petitioner was permitted to withdraw guilty plea, held that this section should be observed upon any subsequent imposition of a new sentence. Morsette v. Ellsworth, 151 M 319, 443 P 2d

Law Review

Agata, Time Served Under a Reversed Sentence or Conviction—A Proposal and a Basis For Decision, 25 Mont. L. Rev. 1 (1963).

DECISIONS UNDER FORMER LAW

Second Conviction

Relator was convicted of the crime of burglary in the first degree. After serving one year and six days he was released from prison pending appeal. The conviction was reversed upon such appeal and a new trial ordered. Upon the new trial

he was again convicted and sentenced for the same period as the first, ten years. During his second incarceration he was not entitled to credit against the second sentence for time served under the first sentence. State ex rel. Nelson v. Ells-worth, 141 M 78, 375 P 2d 316, 318.

- 95-2215. Credit for incarceration prior to conviction. (a) Any person incarcerated on a bailable offense and against whom a judgment of imprisonment is rendered shall be allowed credit for each day of incarceration prior to or after conviction except that in no case shall the time allowed as a credit exceed the term of the prison sentence rendered.
- (b) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of ten dollars (\$10.00) for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

History: En. 95-2215 by Sec. 1, Ch. 196, L. 1967.

Forfeiture of Good Time Allowance

Under former provision that "no person convicted and sentenced before the effective date shall have his rights and earned good time reduced by the application of this act" which in no matter attempted to prohibit the board of prison commissioners from exercising their dis-cretionary power as to the allowance or forfeiture of good time and their power to make such rules and regulations as were reasonable in connection with this power, the board could deprive a prisoner of his good time for parole violations. In re Pelke's Petition, 139 M 354, 365 P 2d 932, 934; In re Owens' Petition, 139 M 637, 365 P 2d 935.

Collateral References

Fines == 12.

36 C.J.S. Fines § 11. 21 Am. Jur. 2d 557 et seq., Criminal Law, § 603 et seq.

Law Review

Agata, Time Served Under a Reversed Sentence or Conviction-A Proposal and a Basis For Decision, 25 Mont. L. Rev.

- 95-2216. Jail work release program. (a) A court, after having sentenced a person to confinement in a county jail, may, in its discretion, upon request of the county attorney and sheriff of such county, and with the consent of the convicted person, order that any part of the imprisonment so imposed be served in confinement, with parole during the hours or periods the convicted person is actually employed.
- (b) Upon the issuance of such an order under this act, the sheriff shall arrange for the convicted person to continue his regular employment without interruption in so far as is reasonably possible; provided, however,

that said prisoner shall be confined in the county jail during the hours when he is not employed.

- (c) The earnings of the prisoner shall be collected by the sheriff. From such earnings, the sheriff shall pay the prisoner's board and personal expenses, both inside and outside the jail and, to the extent directed by the court, pay the support of his dependents, if any, and any balance shall be retained until his discharge.
- (d) The committing court may, in its discretion, upon request of the county attorney and sheriff of such county, reduce the sentence of the prisoner up to one-fourth $(\frac{1}{4})$ of the full term, if, in the opinion of the court, the prisoner's conduct, diligence and general attitude merit such diminution.
- (e) In cases where the convicted person violates the conditions of said sentence, he shall be returned to the court; the court may then require that the balance of his sentence be spent in full confinement and, further, the court may cancel any diminution of sentence granted under this act.
- (f) The court may, by order, authorize the sheriff of the sentencing county to arrange with a sheriff of any other county within the state of Montana, to have the convicted person transferred to the other county where it appears the convicted person can continue his regular employment in the latter county; provided, however, when such transfer has been made to another county, the sheriff of the sentencing county shall still collect all moneys earned by the convicted person, and shall dispose of said moneys as provided by subsection (c) of this section.

History: En. 95-2216 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-7835 to 94-7840.

Condition of Probation

Provisions in probation order permitting petitioner to have employment outside county jail, absolving the sheriff from liability in permitting petitioner to be ab-

sent from his custody without bail, and requiring that petitioner pay his own board at the jail from his earnings, while similar to some former provisions relating to convicted misdemeanants serving county jail sentences did not convert a condition of probation into a term of imprisonment. In re Williams' Petition, 145 M 45, 399 P 2d 732.

95-2217. Prisoner furlough program—purpose and intent. The purpose and intent of this act is to establish a program for the rehabilitation, education, and betterment of selected prisoners confined in the state prison; to increase their responsibility to society; to make it possible that they may, while serving their sentences, work gainfully to support their dependents in whole or in part; and providing for a minimum wage of one and 40/100 (\$1.40) dollars an hour to be paid to said convicts while so employed; continue their education or training; and at the same time fulfill the obligations of the sentence of imprisonment imposed; placing the establishment, regulation, guidance, and control of such program under the direction of the warden of the state prison with the advice and consent of the state board of pardons, which program shall operate by supplementing and not replacing established penal procedures now or hereafter established by law. This act is to be liberally construed to effect the over-all objectives set forth above.

History: En. Sec. 1, Ch. 288, L. 1969.

- 95-2218. Definitions. As used in this act, unless the context indicates otherwise:
 - (1) "Board" means the state board of pardons;
 - (2) "State prison" means the Montana state prison at Deer Lodge;
- (3) "Prisoner" means a person sentenced by a district court to a term of confinement in the state prison;
- (4) "Sheriff" means any county sheriff including all deputies or other persons working under his direction or guidance;
 - (5) "Jail" means any county jail;
- (6) "Warden" means the superintendent of the state prison appointed by the board of institutions.

History: En. Sec. 2, Ch. 288, L. 1969.

- 95-2219. Warden to establish program and rules—privileges granted prisoners. The warden is authorized and directed to establish a furlough program and rules to implement and control the same. A prisoner sentenced to the state prison may be granted the privilege of:
- (1) Working at paid employment for a rate of pay not less than one and 40/100 (\$1.40) dollars an hour, or
 - (2) Participating in an educational or training program.

History: En. Sec. 3, Ch. 288, L. 1969.

95-2220. Application for participation in furlough program. Any prisoner confined in the state prison may make application to participate in the furlough program according to rules adopted by the warden with the advice and consent of the board.

History: En. Sec. 4, Ch. 288, L. 1969.

- 95-2221. Consideration of application—furlough plan—consent of sheriff necessary. (1) The board shall approve or deny the application of the prisoner after careful study of the prisoner's conduct, attitude and behavior in the prison in which the prisoner is confined, his criminal history, and all other pertinent case material.
- (2) If the application is approved, the warden shall adopt a furlough plan for the prisoner, which shall constitute an extension of the limits of confinement.
- (3) No prisoner shall be released without the written consent of the sheriff of the county receiving the prisoner.

History: En. Sec. 5, Ch. 288, L. 1969.

- 95-2222. Disposition of prisoner's earnings—trust fund—schooling costs.
- (1) A prisoner employed in the community under a work furlough plan shall surrender to the sheriff his total earnings less payroll deductions required by law. The sheriff shall deduct from such earnings in the following order of priority:
- (a) A standard charge for all prisoners determined by the county commissioners to be the cost to the county of providing food, lodging and clothing for such prisoner;
- (b) The actual and necessary travel and other expenses of such prisoner under furlough from actual confinement under the program; and

- (c) Such amount as the prisoner may be determined by the district judge to pay for the support of his dependents, which amount shall be paid to such dependents; and
 - (d) A minimal allowance for personal items.
- (2) Any balance remaining after such deductions and payments shall be deposited to an interest-bearing account held in trust for said prisoner and shall be paid to him upon release.
- (3) The above costs of a prisoner under furlough who is in training or school shall be the responsibility of the state.

History: En. Sec. 6, Ch. 288, L. 1969.

- 95-2223. Administrative rules co-operation by state agencies. (1) The warden is authorized to make rules for the administration of the provision of this act with the advice and consent of the board.
- (2) All state agencies shall co-operate with the warden and sheriff in the administration of the furlough program.

History: En. Sec. 7, Ch. 288, L. 1969.

95-2224. Prisoner not agent, employee or involuntary servant of warden or sheriff. No prisoner employed in the community under the provisions of this act shall be deemed to be an agent, employee, or involuntary servant of the warden or sheriff while released from confinement pursuant to the terms of the furlough program.

History: En. Sec. 8, Ch. 288, L. 1969.

95-2225. Eligibility for parole unaffected. Nothing in this act shall be construed to affect eligibility for parole. Time served in the furlough program shall be considered as a part of the imposed sentence of such prisoner.

History: En. Sec. 9, Ch. 288, L. 1969.

- 95-2226. Sheriff's responsibility—cancellation or revocation of furlough. (1) The sheriff of the county to which the prisoner has been released shall be responsible for the activities of the prisoner according to the rules approved by the board. The sheriff shall keep the warden informed.
- (2) If any prisoner released from actual prison confinement under the furlough program shall fail to comply with the rules and regulations of the furlough program, such furlough shall be canceled and such prisoner shall be returned to prison to complete his sentence. No prisoner shall be returned to prison to complete his sentence without first being charged with a violation of the rules and regulations of the furlough program in the district court of the county in which said violation took place and such prisoner shall be entitled to have counsel appointed to represent him at said hearing. Provided however, if said prisoner, while not disabled from working by temporary illness, is unemployed for a period of thirty (30) days, or more, after his availability for employment is reported in writing by the sheriff of the county to which said prisoner is released, to the Montana unemployment compensation commission office serving such area, and to the union to which said prisoner belongs, if any, then the warden,

upon request of said sheriff and upon a showing having been made by the sheriff of said county in the district court that said employee has been so unemployed, or on a showing that said prisoner has become so disabled that he is unemployable, or when said warden shall revoke said furlough and said prisoner is returned to said prison, or if said prisoner is on an education furlough and said prisoner has demonstrated for a period of six (6) weeks or more that he is unable to benefit from such schooling or training, then upon such a showing being made by the sheriff of the county to which said prisoner has been furloughed in a district court of said county, then the warden shall revoke such furlough and said prisoner shall be returned to the prison.

History: En. Sec. 10, Ch. 288, L. 1969.

CHAPTER 23

EXECUTION OF SENTENCE

Section 95-2301. Commitment of defendant. 95-2302.

Execution of a fine. 95-2303. Execution of death.

Lack of mental fitness of the defendant.

Proceedings upon finding of lack of mental fitness. 95-2305.

Proceedings when female is claimed to be pregnant. 95-2306. 95-2307.

Proceedings upon the finding of pregnancy. Western Interstate Corrections Compact—contents. 95-2308.

95-2309. Commitment or transfer of inmate to institution outside of state.

95-2310. Effectuation of purposes of compact.

Hearings requested by other states—power of board of pardons and paroles and state department of institutions to hold. 95-2311.

95-2312. Governor-power to enter into contracts.

95-2301. Commitment of defendant. Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death the court shall commit the defendant to the custody of the sheriff who shall deliver the defendant to the place of his confinement or execution.

History: En. 95-2301 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 119-1.

Authority To Detain

The certified copy of the judgment is the evidence of the warden's authority for detaining the prisoner. Stephens v. Conley, 48 M 352, 367, 138 P 189.

Proceedings in contempt are in their nature criminal, and the order adjudging one in contempt is in its nature a final judgment, but the sheriff cannot execute a judgment in a criminal matter or pro-ceeding "without competent authority," as provided in section 16-2818; hence, where one has been committed for contempt, and the sheriff does not hold a certified copy of the order of commitment, he is not authorized to detain the person so committed. In re Mettler, 50 M 299, 305, 146

Collateral References

Criminal Law ⇒999 (1). 24 C.J.S. Criminal Law § 1608-1612. 21 Am. Jur. 2d 557 et seq., Criminal Law, § 602 et seq.

Loss of jurisdiction by delay in impos-

ing sentence. 3 ALR 1003 and 97 ALR 802.

Power to change time for commencement of sentence. 3 ALR 1572.

What constitutes commencement of service of sentence, depriving court of power to change sentence. 159 ALR 161.

Power of trial court to change sentence after commitment or payment of fine. 168 ALR 706.

Effect of delay in taking defendant into custody after conviction and sentence. 98 ALR 2d 687.

95-2302. Execution of a fine. (a) If the judgment is for a fine alone, execution may issue thereon as on a judgment in a civil case.

(b) If the judgment is for a fine and imprisonment until fine be paid, the defendant must be committed to the custody of the proper officer, and by him detained until the judgment is complied with. The imprisonment must not exceed one day for every ten dollars (\$10.00) of the fine.

History: En. 95-2302 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-8002 and 94-8003.

Cross-Reference

Penalty assessments for traffic offenses, sec. 75-5304.

Alteration of Judgment

The warden of the state prison has no authority to change or alter a judgment of conviction in any particular. State ex rel. Nelson v. Ellsworth, 141 M 78, 375 P 2d 316, 319.

Contempt

An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment until the fine was paid. State ex rel. Coleman v. District Court, 51 M 195, 201, 149 P 973.

Credit for Fine

Where defendant was convicted of a felony under the first portion of a consolidated information and of a misdemeanor under the second portion and the trial court decreed that the sentences could be served concurrently, the sentence for the felony should be served in the state prison, credit for the misdemeanor fine should be given at the same time, and any remaining time under the misdemeanor at the end of the state prison term should be served in the county jail. State v. Bogue, 142 M 459, 384 P 2d 749.

Fine or Imprisonment

A judgment in a case of misdemeanor, imposing a fine of \$500, and providing that in default of payment the defendant be imprisoned "for the term of one day for each \$2 of said fine," is sufficiently definite and certain. State ex rel. Poindexter v. District Court 51 M 186 149 P 958

v. District Court, 51 M 186, 149 P 958.

The district court has the power, under former statute, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after expiration of the term of imprisonment, until the fine is paid. In re Londos, 54 M 418, 170 P 1045.

A judgment that defendant convicted on three counts of the information charging violations of the liquor law pay a fine of \$200 and serve sixty days in the county jail on each count, and that if the fines be not paid, he serve them out at the rate of one day for each two dollars of the fines, held not uncertain or ambiguous, it meaning that he be imprisoned for a total of 180 days, and serve one day for each two dollars of the fines aggregating \$600. In re Pyle, 72 M 494, 498, 234 P 254.

Collateral References

Fines 56.

36 C.J.S. Fines § 9.

21 Am. Jur. 2d 555 et seq., Criminal Law, § 599 et seq.

DECISIONS UNDER FORMER LAW

Fine Only

Former section governing duration of imprisonment on judgment to pay a fine held applicable to a case where a fine only was the penalty imposed. State ex rel. Poindexter v. District Court, 51 M 186, 149 P 958.

Pauper Prisoner

Where the record discloses that a judgment has been rendered imposing fine, and

imprisonment until fine is satisfied, the justice of the peace is without authority to issue an execution provided for by former section authorizing discharge of pauper prisoner after confinement of one day for every two dollars owed on fine, notwithstanding that section was applicable to some extent to practice in the justice courts. Petelin v. Kennedy, 29 M 466, 75 P 82.

95-2303. Execution of death. (a) The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

(b) In pronouncing the sentence of death, the court shall set the date of execution which must not be less than thirty (30) days nor more than sixty (60) days from the date the sentence is pronounced.

(c) A sentence of death must be executed within the walls or yard of a jail or some convenient private place in the county where the trial

took place.

- (d) The sheriff of the county must be present and shall supervise such execution which shall be conducted in the presence of a physician, the county attorney of the county, and at least twelve (12) reputable citizens to be selected by the sheriff. The sheriff shall at the request of the defendant, permit such priests or ministers, not exceeding two (2), as the defendant may name and only persons, relatives or friends, not to exceed five (5), to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. No other persons than those mentioned in this subsection can be present at the execution, nor can any person under age be allowed to witness the same.
- (e) After the execution, the sheriff must make a return upon the death warrant, showing time, mode and manner in which it was executed.

History: En. 95-2303 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, sections 94-8007, 94-8016 to 94-8018.

Collateral References

Criminal Law 1219.

24 C.J.S. Criminal Law §§ 1613-1615; 24B Criminal Law §§ 2001-2003. $21\,$ Am. Jur. $2d\,$ $553\,$ et seq., Criminal Law, § $595\,$ et seq.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452 and 40 ALR 1118.

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

95-2304. Lack of mental fitness of the defendant. If, after judgment of death, there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 5, Competency of the Accused.

History: En. 95-2304 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Criminal Law \$981 (2). 24 C.J.S. Criminal Law \$1569, 1619. Test of present insanity which will prevent trial for crime or punishment after conviction. 3 ALR 94.

Remedy of one convicted of crime while insane. 10 ALR 213 and 121 ALR 267.

DECISIONS UNDER FORMER LAW

Sanity of One Sentenced to Death

Where, after judgment of death has been pronounced upon a defendant, there is good reason to suppose that he has become insane, the sheriff, with the concurence of the judge of the court by which the judgment was rendered, may summon

a jury to inquire into the question of his sanity but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the procedure outlined by former sections was controlling. State v. Vettere, 77 M 66, 71, 249 P 666.

95-2305. Proceedings upon finding of lack of mental fitness. If it is found that defendant is mentally fit as provided in section 95-2304, the sheriff must execute the judgment; but if it is found that he lacks fitness, the execution of judgment must be suspended and the court shall commit him to the custody of the superintendent of the Montana state hospital, to be placed in an appropriate institution of the state department of public institutions for so long as such lack of fitness shall endure. When the court, on its own motion or upon application of the superintendent of the Montana state hospital, or the county prosecuting officer, or the defendant or his legal representative, determines after a hearing if a hearing is

requested, that the defendant has regained fitness to proceed, the sheriff shall be directed by the court to carry out the execution. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant, that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged.

History: En. 95-2305 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8012.

Collateral References Criminal Law@ 98 (2). 24 C.J.S. Criminal Law § 1619.

95-2306. Proceedings when female is claimed to be pregnant. If there is good reason to suppose a woman against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, must summon a jury of three (3) physicians to inquire into the supposed pregnancy. Immediate notice of this inquiry must be given to the county attorney of the county who must attend the inquiry and may produce his own witnesses.

History: En. 95-2306 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 94-8013.

95-2307. Proceedings upon the finding of pregnancy. If it is found by the inquiry that the woman is not pregnant, the sheriff must execute the judgment; if it is found that the woman is pregnant, the sheriff must suspend the execution of judgment, and transmit the inquisition to the governor. When the governor is satisfied that the woman is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

History: En. 95-2307 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 94-8014.

- 95-2308. Western Interstate Corrections Compact—contents. The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of this state with any and all other states legally joining therein in a form substantially as follows:
- 1. Purpose and Policy. The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on the basis of co-operation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of co-operation for the confinement, treatment and rehabilitation of offenders.
- 2. Definitions. As used in this compact, unless the context clearly requires otherwise:
- (a) "State" means a state of the United States, or subject to the limitation contained in subsection 7, Guam.
- (b) "Sending state" means a state party to this compact in which conviction was had.

- (c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.
- (d) "Inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.
- (e) "Institution" means any prison, reformatory or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

3. Contracts.

(a) Each party state may make one (1) or more contracts with any one (1) or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(i) Its duration.

- (ii) Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.
- (iii) Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.
 - (iv) Delivery and retaking of inmates.
- (v) Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.
- (b) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific per centum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that moneys are legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.
- (c) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

4. Procedures and Rights.

(a) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to subsection 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or

desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

- (b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.
- (c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of subsection 3.
- (d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.
- (e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.
- (f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determina-

tion shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

- (g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.
- (h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.
- (i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.
 - 5. Acts Not Reviewable in Receiving State—Extradition.
- (a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.
- (b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.
- 6. Federal Aid. Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

- 7. Entry into Force. This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.
- 8. Withdrawal and Termination. This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two (2) years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.
- 9. Other Arrangements Unaffected. Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of co-operative institutional arrangements.
- 10. Construction and Severability. The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. 95-2308 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 94-8019.

95-2309. Commitment or transfer of inmate to institution outside of state. Any court or state agency having power to commit or transfer an inmate (as defined in section 95-2308, subsection 2 (d) of the Western Interstate Corrections Compact) to any institution for confinement may

commit or transfer such inmate to any institution outside this state if this state has entered into a contract or contracts for the confinement of inmates in said institution pursuant to section 95-2308, subsection 3 of the Western Interstate Corrections Compact.

History: En. 95-2309 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, L. 1967.

95-231Q. Effectuation of purposes of compact. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of such reports as are required by the compact.

History: En. 95-2310 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, section 94-8021.

95-2311. Hearings requested by other states—power of board of pardons and paroles and state department of institutions to hold. The board of pardons and paroles and the state department of institutions are hereby authorized and directed to hold such hearings as may be requested by any other party state pursuant to section 95-2308, subsection 4 (f) of the Western Interstate Corrections Compact.

History: En. 95-2311 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, L. 1967.

95-2312. Governor—power to enter into contracts. The governor is hereby empowered to enter into such contracts recommended by the department of institutions on behalf of this state as may be appropriate to implement the participation of this state in the Western Interstate Corrections Compact pursuant to section 95-2308.

History: En. 95-2312 by Sec. 1, Ch. 196, Source: Revised Codes of Montana 1947, L. 1967.

CHAPTER 24

APPEAL BY STATE AND DEFENDANT

Section 95-2401. Application of chapter. 95-2402. Suspension of the rules. 95-2403. Scope of appeal. 95-2404. Scope of appeal. 95-2405. Procedure on appeal. 95-2406. Stay of execution and relief pending appeal. 95-2407. Effect of an appeal by the state. 95-2408. The record on appeal. 95-2409. Transmission of the record. 95-2410. Docketing the appeal—filing of the record. 95-2411. Effect of dismissal. 95-2412. Ruling against respondent may be reviewed. 95-2413. Filing and service. 95-2414. Computation and extension of time. 95-2415. Motions. 95-2416. Briefs. 95-2417. Brief of an amicus curiae. 95-2418. The appendix to the briefs. 95-2419. Filing and service of briefs.

Form of briefs, the appendix, motions and other papers.

95-2421. Oral argument.

95-2422. Entry and notice of orders and judgments.

95-2423.

Petitions for rehearing. Calendar—withdrawal of records. 95-2424.

95-2425. Substantial and insubstantial errors on appeal.

95-2426. Determination of appeal.

95-2427. Issuance of mandate, return of record and termination of jurisdiction.

95-2428. Indigent appeals.

95-2429. Appeal by one defendant.

95-2430. Defendant discharged on reversal of judgment.

95-2401. Application of chapter. (a) This chapter shall govern review in all criminal cases.

All existing methods of review in criminal cases in the state are abolished. Hereafter the only method of review in criminal cases shall be by notice of appeal.

History: En. 95-2401 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Notice of appeal is the sole method of review in criminal cases. However, it does not limit or affect any types of review incidental to the extraordinary writs, post-conviction writs or post-conviction relief.

Source: Illinois Code of Criminal Procedure, Chapter 38, sections 121-1, and

95-2402. Suspension of the rules. In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

History: En. 95-2402 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

The supreme court has the power to expedite the determination of cases of

pressing concern to the public or to the litigants by prescribing a time schedule other than that provided.

Source: Montana Rules of Appellate Civil Procedure, Rule 3 modified.

95-2403. Scope of appeal. (a) Except as authorized by this code, the state may not appeal in a criminal case.

- The state may appeal from any court order or judgment the substantive effect of which results in:
 - dismissing a case;
- modifying or changing the verdict as provided in section 95-2101 (2)(c) (3);
 - (3)granting a new trial;
 - quashing an arrest or search warrant; (4)
 - (5)suppressing evidence;
 - (6) suppressing a confession or admission; or
 - granting or denying change of venue.

History: En. 95-2403 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 120-1.

Authority for Appeal

The right of appeal in a criminal case, unknown to the common law, exists only by virtue of constitutional or statutory enactment. State v. Peck, 83 M 327, 329, 271 P 707.

Statutes granting the right of appeal to the state in criminal actions must be strictly construed and the right limited to the instances mentioned; if the right is not clearly and unequivocably conferred, an appeal does not lie, nor can the right, if conferred, be enlarged by construction of the statute. State v. Peck, 83 M 327, 329, 271 P 707.

Construction

Defendant was convicted in a justice court of engaging in the business of plumbing without obtaining a license; he appealed to the district court where, after trial, the court entered judgment that the statute in question was unconstitutional and discharged defendant. The state appealed. Held, that the judgment did not fall within any one of the provisions of former section, granting the state the right of appeal in a criminal case, and appeal dismissed. State v. Wright, 91 M 427, 429, 8 P 2d 646.

Limited Right of Appeal by State

The right of appeal by the state should be strictly construed and limited to those instances mentioned in the statute. Territory v. Laun, 8 M 322, 325, 20 P 652; State v. Northrup, 13 M 522, 530, 35 P

The state has no appeal in criminal cases, unless the same is expressly granted by law. Territory v. Laun, 8 M 322, 325, 20 P 652; State v. Northrup, 13 M 522, 530, 35 P 228.

Where defendant was convicted in justice of peace court and appealed to district court in which court the action was dismissed on defendant's motion, state had no right of appeal. State v. McCluskey, 125 M 20, 229 P 2d 169.

A district court's order of dismissal of the complaint following an appeal from a conviction in a justice of the peace court did not fall within the provisions of former section and therefore was not appealable order. State v. Becko, 125 M 76, 230 P 2d 768, 769.

Order Arresting Judgment

Regarding the substance of things, an order arresting judgment is, in its nature and results, a judgment for defendant. It is a denying of a judgment to the state, and a discharge and acquittal of defendant from any possible consequences that threatened to flow from the information. State v. Northrup, 13 M 522, 537, 35 P

Order Made after Judgment

State could not appeal from an order of the district court sustaining a defendant's plea of former acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree. State v. O'Brien, 19 M 6, 47 P 103.

Order Setting aside Information

An appeal cannot be taken by the state from an order setting aside an informa-tion. State v. O'Brien, 20 M 191, 50 P 412.

Order Sustaining Demurrer to Information Constitutes Judgment

An order sustaining a demurrer to an information constitutes a judgment; former statute authorized appeal by state from adverse judgment on demurrer to indictment or information. State v. Safeway Stores, Inc., 106 M 182, 197, 76 P 2d

Collateral References

Criminal Law 1024 (1-4), (7).

24 C.J.S. Criminal Law §§ 1659-1662; 24A C.J.S. Criminal Law § 1837. 4 Am. Jur. 2d 761-763, Appeal and

Error, §§ 267-269.

Right of prosecution to review of decision quashing or dismissing indictment or information, or sustaining demurrer thereto. 92 ALR 1137.

Constitutionality of statute permitting appeal by state in criminal case. 113 ALR 636 and 157 ALR 1065.

Right of municipality to review of unfavorable decision in action for violation of municipal ordinance. 116 ALR 120.

Right of public officer or board to appeal from a judicial decision affecting his or its order or decision. 117 ALR 216.

Judgment or order suspending imposition or execution of sentence, or judgment in quasi-criminal case, execution of which is suspended, as a final judgment or decision from which an appeal will lie. 126 ALR 1210.

DECISIONS UNDER FORMER LAW

Appeal from Directed Verdict

Former statute provided that the state might appeal in a criminal case, inter alia, from an order directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered defendant discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order could not be held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated as one from which the state might appeal, the appeal would, on defendant's motion, be dismissed. State v. Peck, 83 M 327, 331, 271 P 707.

Demurrer to Complaint

Under former section authorizing state to appeal from adverse judgment on a demurrer to indictment or information, state could not appeal from a judgment for defendant on demurrer to a complaint charging a misdemeanor. State v. Morris, 22 M 1, 3, 55 P 360.

An order sustaining a demurrer to a complaint did not fall within any of the provisions of former section and therefore was not an appealable order. State v. Slater, 130 M 630, 302 P 2d 470.

Directed Verdict

Statute provided that the state may appeal in a criminal case, inter alia, from an order directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered defendant

discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order was not held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated as one from which the state might appeal, the appeal would on defendant's motion be dismissed. State v. Peck, 83 M 327, 329, 271 P 707.

An appeal by the state from the order

An appeal by the state from the order of the court directing the jury to find for the defendant was expressly provided for by former section. State v. Rother, 130

M 357, 303 P 2d 393, 394.

95-2404. Scope of appeal. When may be taken by the defendant.

- (a) An appeal may be taken by the defendant only from a final judgment of conviction, and orders after judgment which affect the substantial rights of the defendant.
- (b) Upon appeal from a judgment, the court may review the verdict or decision, and any order or decision objected to which involves the merits, or necessarily affects the judgment.

History: En. 95-2404 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

All questions capable of being raised on appeal may be raised on appeal from the judgment regardless of whether a motion for a new trial has been made in the trial court.

Source: Montana Rules of Appellate Civil Procedure, Rule 2.

Appeals from Justice Courts

The supreme court does not have appellate jurisdiction to review the judgments or orders of the justice courts. State ex rel. Estes v. Justice Court of Jefferson County, 129 M 136, 284 P 2d 249, 250.

Denial of New Trial

On appeal under former statute, from the judgment of conviction only, an assignment of error for denial of defendant's motion for a new trial could not be considered. State v. Ritz, 65 M 180, 189, 211 P 298; State v. English, 71 M 343, 350, 229 P 727.

Denial of Petition for Writ of Error Coram Nobis

Leave to file an appeal from a denial of petition for a writ of error coram nobis by the district court was denied by the supreme court since no leave to file an appeal is required under the law and if an appeal was available from the district court order, the time therefor had not expired. Brown v. State, 140 M 289, 371 P 2d 262, 263.

Intermediate Orders

An order overruling a motion in arrest of judgment is an intermediate order affecting the judgment, and may be reviewed only on appeal from the judgment. State v. Beeskove, 34 M 41, 48, 85 P 376; State v. Brown, 38 M 309, 311, 99 P 954.

The supreme court on appeal from the judgment, may not review the sufficiency of the evidence to warrant conviction, in the absence of any intermediate order or ruling involving the merits or which may have affected the judgment. State v. Asher, 63 M 302, 308, 206 P 1091.

Motion in Arrest of Judgment

An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of defendant. State v. Beeskove, 34 M 41, 48, 85 P 377; State v. Brown, 38 M 309, 311, 99 P 954.

Order after Judgment

Defendant may appeal from an order made after final judgment. State v. Fowler, 59 M 346, 196 P 992.

Order Denying Petition for Writ of Prohibition

Order of district court denying petition of defendant for writ of prohibition to restrain justice court from further proceedings in criminal action was not a judgment and could not be appealed. State ex rel. Aho v. Justice Court of Laurel Township, 131 M 585, 313 P 2d 542, 543.

Perfecting Appeal While New Trial Motion Pending

The act of defendant in a criminal prosecution in perfecting an appeal from the

judgment of conviction while his motion for a new trial was pending, did not deprive the trial court of jurisdiction thereafter to pass upon the motion, nor the supreme court of jurisdiction to consider the subsequent appeal from the order denying the new trial. State v. Harkins, 85 M 585, 590, 281 P 551.

Question of Law

The defendant, on appeal from a judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision upon questions of law arising during the course of the trial, exclusive of those embraced within the provisions of the statute providing for new trials. State v. Francis, 58 M 659, 666, 194 P 304.

Collateral References

Criminal Law \$\infty\$ 1004, 1023 (2), (12), (13).

24 C.J.S. Criminal Law § 1623 et seq. 4 Am. Jur. 2d, Appeal and Error, pp. 672-679, §§ 159-166; pp. 761-768, §§ 267-275; 5 Am. Jur. 2d, Appeal and Error, pp. 152-154, §§ 707, 708; pp. 220-222, §§ 778, 779; p. 226, § 784; p. 238, § 798; p. 260, § 819; p. 305, § 867; p. 342, § 909; p. 364, § 938; p. 404, § 976.

Remedy of one convicted of crime while insane. 10 ALR 213 and 121 ALR 267.

Payment of fine or serving sentence, as waiver of right to review conviction. 18 ALR 867 and 74 ALR 638.

Prejudicial error in instructing as to lesser degree of homicide, in absence of evidence to support charge of lesser degree. 21 ALR 603; 27 ALR 1097 and 102 ALR 1019.

Incompetency or mismanagement of attorney as grounds for new trial or reversal in criminal case. 24 ALR 1025 and 64 ALR 436.

New trial on ground of newly discovered evidence which court has jurisdiction to determine motion for, pending appeal or after affirmance of conviction. ALR 1091.

Appeal as remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1515.

Communications between jurors and others as grounds for reversal in criminal case. 62 ALR 1466.

Instruction disparaging defense of alibi as prejudicial error. 67 ALR 126 and 146 ALR 1377.

Reversal as to one party to conspiracy as requiring reversal as to others. 72 ALR 1188 and 91 ALR 2d 700.

Criticism of argument of defendant's counsel in criminal case in judge's charge to jury. 86 ALR 899.

Reduction by appellate court of punishment imposed by trial court. 89 ALR 295.

Irregularity in drawing names for jury panel as ground of complaint by defend-

ant in criminal prosecution. 92 ÅLR 1109. Abuse of discretion by judge in criminal case under rule permitting him to express comment or opinion on weight or significance of evidence. 95 ALR 785 and 113 ALR 1308.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant. 96 ALR 508.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to reversal. 96 ALR 530.

Loss of jurisdiction by delay in imposing sentence in criminal case pending proceedings to review. 97 ALR 811.

Raising for first time on appeal question of right to preliminary investigation as to voluntary character of confession. 102 ALR 625.

Errors in calling upon accused in presence of jury to produce document in his possession, as cured by cautionary instruction. 110 ALR 114.

Permitting taking of dying declarations to jury room. 114 ALR 1519.

Presumption that court sitting without jury in criminal prosecution acted only on basis of proper evidence. 116 ALR 558.

Comment by prosecuting attorney on accused's failure to offer, or refusal to permit introduction of, privileged testimony, or to permit privileged witness to testify, as grounds for reversal. 116 ALR 1175.

Convicted person's acceptance of probation, parole, or suspension of sentence as waiver of right to appeal. 117 ALR 929.

Error in excluding exculpatory statements where state has introduced incriminating portion of conversation or statements by accused, as cured by permitting defendant to testify as to such statements. 118 ALR 146.

Reversible error in failing to instruct on subject of alibi. 118 ALR 1303.

Comment by prosecuting attorney regarding jury's right or privilege to recommend or fix punishment. 120 ALR 502.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed. 124 ALR 841.

Judgment or order suspending imposition or execution of sentence, or judgment in quasi-criminal case, execution of which is suspended, as a final judgment or decision from which an appeal will lie. 126 ALR 1210.

Statements or arguments by prosecuting attorney to give jury impression that court believed defendant guilty as grounds for reversal. 127 ALR 357.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial. 133 ALR 935.

Suspension of appeal during war where party is alien enemy. 137 ALR 1346; 147 ALR 1298; 148 ALR 1384; 149 ALR 1452; 150 ALR 1418 and 154 ALR 1447.

Application for or acceptance of executive clemency as affecting appellate proceedings. 138 ALR 1162.

2d 1111.

Time for and manner of raising question of present sanity of accused. 142 ALR 973. Exclusion or absence of defendant, pending trial of criminal case, from courtroom or from conference between court and attorneys, during argument on the question of law. 144 ALR 199 and 85 ALR

Overemphasis in proof of former conviction in connection with habitual criminal law, or unnecessary introduction of

evidence in that regard, as prejudicial to accused. 144 ALR 240.

Right of accused to attack indictment or information after reversal or setting aside of conviction. 145 ALR 493.

Lower court's consideration, on the merits of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review. 148 ALR 795.

Plea of guilty without advice of coun-

sel. 149 ALR 1403.

Jurisdiction to proceed with trial of criminal case pending appeal from order overruling demurrer, motion to quash or similar motion for dismissal. 89 ALR 2d

Prejudicial effect of statement of prosecutor that if jury makes mistake in convicting it can be corrected by other authorities. 3 ALR 3d 1448 and 5 ALR

DECISIONS UNDER FORMER LAW

Appeal from Judgment of Conviction Only

On appeal under former statute, from the judgment of conviction only, a specification of error based upon the order denying their motion for new trial on the ground of misconduct of one of the jurors, cannot be considered. State v. Maggert, 64 M 331, 337, 209 P 989.

On appeal from the judgment of conviction only an assignment of error for denial of defendant's motion for a new trial cannot be considered. State v. Ritz, 65 M 180, 189, 211 P 298.

Construction

Former section stating what might be reviewed on appeal by defendant was taken verbatim from the California code and was adopted with the construction placed upon it by the courts of that state. State v. O'Brien, 18 M 1, 6, 43 P 1091, 44 P 399; State v. Brantingham, 66 M 1, 7, 212 P 499.

Denial of Habeas Corpus

Former sections providing that defendant might appeal to supreme court from any judgment against him and stating that defendant could appeal from a final judgment of conviction did not authorize appeal from an order denying habeas corpus, since the complainant in such a proceeding was not a defendant, and the determination of the court was not a "judgment," within the meaning of those sections. State ex rel. Jackson v. Kennie, 24 M 45, 50, 60 P 589.

Directed Verdict

Former section providing the state might appeal from order directing jury to find

for defendant was constitutional. State v. Thierfelder, 114 M 104, 116, 132 P 2d 1035, overruled on other grounds in State v. Labbitt, 117 M 26, 35, 156 P 2d 163.

Evidentiary Matters

Under former statute, rulings of the trial court upon matters of law in the exclusion or admission of testimony, during the progress of the trial might be brought before the supreme court by bill of exceptions on an appeal from the judgment without a motion for a new trial; but the statute did not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted, except errors in the decision of questions of law during the trial, which might be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. State v. O'Brien, 18 M 1, 5, 6, 43 P 1091, 44 P 399.

Judgment

Judgment mentioned in former section providing that defendant might appeal to supreme court from any judgment against him was the final judgment or other orders referred to in another former section stating when appeal could be taken by defendant and embraced only those judgments and orders which become res adjudicata and final as to all matters involved in the controversy; order denying habeas corpus was not such an order. State ex rel. Jackson v. Kennie, 24 M 45, 50, 60 P 589.

Motion for New Trial

Under former section permitting review of intermediate rulings, an appellant may by bill of exceptions bring before the supreme court for review any order or ruling of the trial court in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion or in instructing the jury, but the sufficiency of the evidence to justify the verdict may be reviewed only on appeal from an order denying a new trial, unless the record discloses that there is no evidence even remotely to prove the elements of the

crime charged. State v. Smart, 81 M 145, 148, 262 P 158.

Timeliness of Appeal

Part of defendant's appeal claiming that the trial court erred in denying motion of defendant for a mistrial was properly before the supreme court where it was taken within six months after the rendition of the judgment of conviction as prescribed by former statute. State v. Tiedemann, 139 M 237, 362 P 2d 529, 530.

95-2405. Procedure on appeal. (a) An appeal shall be taken by filing a notice of appeal in the court in which the judgment or order appealed from is entered or filed.

- (b) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment or order appealed from.
- (c) Service of Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.
- (d) The party appealing shall be known as the appellant and the adverse party as the respondent but the title of the case shall not be changed in consequence of the appeal.
- (e) An appeal from a judgment may be taken within sixty (60) days after its rendition.

History: En. 95-2405 by Sec. 1, Ch. 196, L. 1967.

Source: Montana Rules of Appellate Civil Procedure, Rules 4(e) and 4(d).

Copy of Transcript

Where person convicted in district court petitioned supreme court for writ of mandate to compel district to furnish "copy of trial and court record transcript" for purpose of appeal in forma pauperis, writ was denied where no timely application had been filed. State ex rel. Treat v. District Court, 124 M 234, 221 P 2d 436, 437.

Denial of Motion for Mistrial

Part of defendant's appeal claiming that

the trial court erred in denying motion of defendant for a mistrial was properly before the supreme court where it was taken within time allowed by statute. State v. Tiedemann, 139 M 237, 362 P 2d 529, 530.

Denial of Motion for New Trial

Motion of state to strike defendant's third specification of error, contending that there was no substantial evidence to support the verdiet or judgment of conviction, was granted where appeal was not taken within sixty days after the order denying the motion for a new trial. State v. Tiedemann, 139 M 237, 362 P 2d 529, 530.

Excuse for Failure To Take Appeal

Under former statute allowing six months to appeal from a judgment, death of defense counsel nearly a year after the trial and order of commitment was not sufficient showing to justify an original writ of habeas corpus in supreme court. Dryman v. State, 139 M 141, 361 P 2d 959.

Failure To File Timely Notice of Appeal

Where district court appointed counsel for the defendant and ordered preparation of the record for an appeal to the supreme court, all at public expense, defendant having had no voice in the choice, in the interest of justice it was incumbent upon the supreme court to consider the contended errors although court-appointed counsel failed to timely file the notice of appeal. State v. Frodsham, 139 M 222, 362 P 2d 413, 418.

Notice of Appeal

Motion of attorney general to dismiss appeals was well taken where appeals were not taken within time allowed by statute, no notice of appeal was filed or served, no proper record on appeal was

filed and no papers on the appeals were served upon either the county attorney or attorney general. State v. Martin, 147 M 548, 416 P 2d 22.

Oral Request for Appeal Ineffective

Oral request of intention to appeal made orally in open court is wholly ineffectual to give the supreme court jurisdiction. State ex rel. Treat v. District Court, 124 M 234, 221 P 2d 436, 437.

Collateral References

Criminal Law 2069, 1070, 1087, 1106 (2).

24A C.J.S. Criminal Law §§ 1703, 1711, 1772.

4 Am. Jur. 2d, Appeal and Error, p. 782 et seq., § 292 et seq.; p. 795 et seq., § 310 et seq.

Seal as necessary to validity of transcript of records. 30 ALR 739.

Power of trial court indirectly to extend time for appeal. 89 ALR 941 and 149 ALR 740

ALR 740.
Failure, due to fraud, duress, or misrepresentation by adverse parties, to file notice of appeal within prescribed time. 149 ALR 1261.

DECISIONS UNDER FORMER LAW

Clerk's Duties

Requirements of former statute were that the clerk of the district court must, as soon as notice of appeal is filed, prepare a copy of the record and other papers and transmit the same within ten days from the date of the notice, or, in case there is a bill of exceptions to be settled,

then within ten days of the date of settlement, to the clerk of the supreme court, without charge to the appellant. A praecipe enumerating the papers constituting such technical record need not be lodged with the clerk. State ex rel. Connors v. Foster, 36 M 278, 280, 92 P 761.

95-2406. Stay of execution and relief pending appeal. (a) Death. If an appeal is taken a sentence of death shall be stayed by order of the trial court until final order by the supreme court.

- (b) Imprisonment. If an appeal is taken and the defendant is admitted to bail, a sentence of imprisonment shall be stayed by the trial court.
- (c) Fine. If an appeal is taken, a sentence to pay a fine, or a fine and costs, shall be stayed by the trial court or by the reviewing court.
- (d) Probation. If an appeal is taken and the accused was admitted to probation, he shall remain on probation or post bail.

History: En. 95-2406 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

There is no requirement to obtain a judicial certificate stating that there is probable cause for appeal.

Review is permitted even though defendant is admitted to probation. If

defendant is admitted to probation the order so admitting him shall remain in effect or he must post bail.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 121-6.

Collateral References

4 Am. Jur. 2d 839 et seq., Appeal and Error, § 364 et seq.

DECISIONS UNDER FORMER LAW

Probable Cause for Appeal

No appeal lies from a refusal of a district judge to grant a certificate of probable cause. State v. Broadbent, 27 M 63,

65, 69 P 323.

Under former statute authorizing stay in execution of judgment in noncapital cases if a judge of convicting court or supreme court certified that there was probable cause for appeal, petitions to a justice of the supreme court for certificates of probable cause must be verified by the oath of the petitioner, or of some person in his behalf. State v. Broadbent, 27 M 63, 65, 69 P 323.

Where the transcript discloses a fairly debatable question, the solution of which in defendant's favor by the supreme court would necessitate a reversal, a certificate of probable cause will be granted. State v. Broadbent, 27 M 63, 65, 69 P 323.

Execution of a judgment in a criminal case is not stayed by appeal, but may be stayed by filing with the clerk a certificate of probable cause issued by the judge or a justice of the supreme court. State v. Fowler, 59 M 346, 358, 196 P 992.

v. Fowler, 59 M 346, 358, 196 P 992.

The effect of a certificate of probable cause granted to one convicted of crime pending appeal, is to suspend execution

of the judgment and entitles defendant to his liberty upon furnishing bond, and the certificate should be granted by the district court whenever the question whether or not the conviction will be sustained on appeal is fairly debatable, thus avoiding the necessity of defendant applying to the supreme court for relief in that behalf. State v. Dahlgren, 74 M 217, 235, 239 P 775.

On appeal from conviction for embezzlement, presenting the question of former jeopardy, the trial court denied defendant a certificate of probable cause. Whereupon he applied to the supreme court for such certificate and for a stay of proceedings until a bill of exceptions could be prepared, settled and allowed (the supreme court needing the same to determine the question of probable cause). The stay was granted to present the bill of exceptions and transcript in aid of the application for the certificate of probable cause. State v. Parmenter, 111 M 290, 291, 108 P 2d 600.

A certificate of probable cause should be granted by the district court whenever the question of whether or not the conviction will be sustained on appeal is fairly debatable. State ex rel. Nelson v. Ellsworth,

141 M 78, 375 P 2d 316, 319.

95-2407. Effect of an appeal by the state. An appeal taken by the state in no case stays or affects the operation of the judgment or order in favor of the defendant until judgment or order is reversed.

History: En. 95-2407 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8108.

Collateral References Criminal Law©≈1084. 24A C.J.S. Criminal Law § 1715.

- 95-2408. The record on appeal. (a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.
- (b) The Transcript of Proceedings; Duty of Appellant to Order, Notice to Respondent if Partial Transcript is Ordered; Cost of Producing. Within ten (10) days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant

to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within ten (10) days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

- (c) Statement of the Evidence or Proceedings When No Report was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within ten (10) days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within ten (10) days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such records after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.
- Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subsection (a) of this section, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issue presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by section 95-2409. Copies of the agreed statement may be filed as the appendix required by

section 95-2418.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, on proper suggestion of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

History: En. 95-2408 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

As to subdivision (b) the applicable Federal Advisory Committee's Note states: "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of the issues presented by the appeal. Such a statement is not the equivalent of an assignment of errors, which is nowhere required in the proposed rules, and the statement would not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this sub-division and in consequence failed to designate for transcription material parts of the reported proceedings may seek relief under subdivision (e).

Source: Montana Rules of Appellate Civil Procedure, Rule 9.

Duty of Defense Counsel

Where court-appointed counsel failed to advise the clerk's office as to what would be required for the record on appeal from conviction of burglary and there was no record before the supreme court, defendant had been denied his right to effective representation by counsel on his appeal and the cause was remanded to the district court with directions to revoke ap-

pointment of present counsel and appoint a competent and effective counsel to properly prosecute the appeal. State v. Bubnash, 139 M 517, 366 P 2d 155, 158.

Record

The supreme court was without jurisdiction to consider an appeal where the record did not contain a copy of the notice of appeal. City of Butte v. Call, 23 M 94, 95. 57 P 726.

55, 57 P 726.

Where the record on appeal does not contain the judgment the appeal is subject to dismissal on motion. State v. Mott,

29 M 292, 308, 74 P 728.

The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge. State v. Farriss, 34 M 424, 425, 87 P 177.

Record on appeal from an order sustaining a demurrer to the information, consisting of the information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of the clerk of court, held, sufficient as against contention that it should consist of a bill of exceptions duly settled; the record containing all that was required by former section, except instructions, none having been given; no exception being required to court's ruling on demurrer, bill of exceptions therefore idle act. State v. Safeway Stores, Inc., 106 M 182, 197, 76 P 2d 81.

DECISIONS UNDER FORMER LAW

Copy of Judgment

Where the record in a criminal case on appeal by the state from a judgment sustaining a demurrer to the information contains the minute entry allowing the demurrer, the appeal is not subject to dismissal on the ground that the transcript does not contain a copy of the judgment, the order entered in the minutes constitut-

ing the judgment in such a case. State v. Atlas, 75 M 547, 549, 244 P 477.

State's appeal from order made at close of its case in chief directing return of verdict in favor of defendant was not subject to dismissal on ground that record on appeal did not contain a copy of judgment since it did contain a copy of order with attributes constituting judgment. State v.

Thierfelder, 114 M 104, 108, 111, 132 P 2d 1035, overruled on other grounds, in State v. Labbitt, 117 M 26, 35, 156 P 2d 163.

Judgment Rolls

The record on appeal in a criminal case must, among other things contain the judgment roll in which must be included a copy of the judgment. The state on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the infor-

mation is in effect a demurrer to the information and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. State v. Nilan, 75 M 397, 400, 243 P 1081.

- 95-2409. Transmission of the record. (a) Time for Transmission, Duty of Appellant. The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within forty (40) days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subsection (c) of this section. Promptly after filing the notice of appeal the appellant shall comply with the provisions of section 95-2408 (b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of section 95-2408 (b) and this subsection, and a single record shall be transmitted within forty (40) days after the filing of the final notice of appeal.
- (b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.
- (c) Extension of Time for Transmission of the Record—Reduction of Time. The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than ninety (90) days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to cause

beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) Retention of the Record in the District Court by Order of Court. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) Stipulation of Parties that Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

History: En. 95-2409 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

If the appellant is prevented from securing the necessary transcript within the 40-day period by circumstances beyond his control, he may seek an extension of time for transmitting the record.

The appellant has the primary responsibility for effecting timely transmission of the record. His responsibilities include the payment of any required fee or charge.

Although the appellant is allowed 40 days between the filing of the notice of appeal and the transmission of the record in order to allow him to secure the necessary transcript, if the transcript is available sooner, the allowance is unnecessary, and either party may oblige the clerk of the district court to transmit the record forthwith. On the other hand, unless the record contains the necessary transcript, the clerk is not to transmit it.

Source: Montana Rules of Appellate Civil Procedure, Rule 10.

- 95-2410. Docketing the appeal—filing of the record. (a) The clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action in the district court with such addition as is necessary to indicate the identity of the appellant.
- (b) Filing of the Record. Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal his been timely docketed, the clerk shall file the record without the necessity of a docketing fee. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal. If the appellant shall fail to cause timely transmission of the record, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that seven (7) days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

History: En. 95-2410 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967. Civil Procedure, Rule 11.

95-2411. Effect of dismissal. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

History: En. 95-2411 by Sec. 1, Ch. 196, L. 1967.

Source: Montana Rules of Appellate Civil Procedure, Rule 12.

Collateral References

Criminal Law 1182.
24A C.J.S. Criminal Law § 1820; 24B C.J.S. Criminal Law § 1945.
5 Am. Jur. 2d, Appeal and Error, p. 340 et seq., § 905 et seq.; p. 358 et seq., \$ 930 et seq.

95-2412. Ruling against respondent may be reviewed. Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. No cause shall be reversed by reason of any error committed by the trial court against the appellant, unless the record shows that the error was prejudicial.

History: En. 95-2412 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate Civil Procedure, Rule 14. L. 1967.

- 95-2413. Filing and service. (a) Filing. Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which may be granted by a single judge the judge may permit the motion to be filed with him in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.
- Service of All Papers Required. Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the

party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

- (c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.
- (d) Proof of Service. Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

History: En. 95-2413 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2414. Computation and extension of time. (a) Computation of Time. In computing any period of time prescribed by this chapter, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.
- (b) Additional Time after Service by Mail. Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, three (3) days shall be added to the prescribed period.

History: En. 95-2414 by Sec. 1, Ch. 196, L. 1967.

Source: Montana Rules of Appellate Civil Procedure, Rule 21.

Cross-References

Computation of time, sec. 90-407. Legal holiday defined, sec. 19-107.

95-2415. Motions. Unless another form is prescribed by this chapter, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within seven (7) days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

History: En. 95-2415 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2416. Briefs. (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
- (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
 - (2) A statement of the issues presented for review.
- (3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below.

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see section (e) hereof).

- (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.
 - (5) A short conclusion stating the precise relief sought.
- (b) Brief of the Respondent. The brief of the respondent shall conform to the requirements of subsection (a), subdivisions (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.
- (c) Reply Brief. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.
- (d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "accomplice," "decedent," etc.
- (e) References in Briefs to the Record. When a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e.g., Answer, p. 7; Motion for Suppression of Evidence, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.
- (f) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court.
- (g) Length of Briefs. Except by permission of the court briefs shall not exceed fifty (50) pages of standard typographic printing or seventy (70) pages of printing by any other process of duplicating or copying,

exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

History: En. 95-2416 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967. Civil Procedure, Rule 23.

95-2417. Brief of an amicus curiae. A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

History: En. 95-2417 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2418. The appendix to the briefs. (a) Use of an Appendix. At any time before final decision, the supreme court may order an appendix to any brief. Also, either the appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.
- (b) Contents of the Appendix. Unless otherwise ordered by the supreme court, an appendix shall contain:
 - (1) the relevant docket entries in the proceeding below;
- (2) any relevant pleading and relevant portions of the charge, finding and opinion;
 - (3) the judgment, order or decision in question; and
- (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.
- (c) Arrangement of the Appendix. At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where the page begins. Omissions in the text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) Reproduction of Exhibits. Exhibits may be contained in a separate volume, suitably indexed.

History: En. 95-2418 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2419. Filing and service of briefs. (a) Time for Filing Briefs. The appellant shall serve and file his brief within thirty (30) days after the date on which the record is filed. The respondent shall serve and file his brief within thirty (30) days after service of the brief of the appellant. The appellant may serve and file a reply brief within fourteen (14) days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least three (3) days before argument.
- (b) Number of Copies to be Filed and Served. Six (6) copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one (1) copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by section 95-2413.
- (c) Consequences of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this section, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

History: En. 95-2419 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2420. Form of briefs, the appendix, motions and other papers. (a) Form of Briefs, Appendices and Separate Volumes of Exhibits. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be ten (10) inches long and seven (7) inches wide, with a margin on the outer edge not less than one (1) inch wide and on the inner edge not less than two (2) inches wide. If produced by a duplicating or copying process, the pages shall be eleven (11) inches long and eight and one-half (81/2) inches wide, with a margin on the outer edge not less than one (1) inch wide and on the inner edge not less than two (2) inches wide. The pages shall be fastened at the side and numbered at the top.
- (b) Typewritten Papers and Motions. Papers not required to be produced in a manner prescribed by subsection (a) of this section shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one (1) side only of white typewriter paper, eight and one-half (8½) inches wide and thirteen (13) inches long, numbered at the bottom, with a ruled margin of one and one-half (1½) inches on the left-hand side of the page and one (1) inch on the

right-hand side, and numbered lines, not more than thirty-two (32) lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than two hundred fifty (250) pages; provided, however, that if the pages number fifty (50) or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this section will be strictly applied and papers not complying with it will not be received.

(c) First Page and Cover. All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subsection (b) of this section, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of the supreme court, the title of the case as in the court below, adding to the words "plaintiff" and "defendant," the words "appellant" and "respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

History: En. 95-2420 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2421. Oral argument. (a) Notice of Hearing Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.
- (b) Time Allowed for Argument. Upon oral argument of an appeal or original proceeding, forty (40) minutes will be allowed appellant or applicant and thirty (30) minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.
- (c) Order and Content of Argument. The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argument shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.
- (d) Nonappearance of Counsel—Failure to File Briefs. If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

- (e) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.
- (f) Use of Physical Exhibits at Hearing-Removal. If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

History: En. 95-2421 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

If there are multiple appellants they have a total of 40 minutes, and multiple respondents have a total of 30 minutes. The 40 minutes for the appellant or applicant may be divided between the opening and closing statement, as the appellant or applicant chooses.

Source: Montana Rules of Appellate Civil Procedure, Rule 29.

Collateral References

Criminal Law \$\infty 1829, 1845. 24A C.J.S. Criminal Law \\$\\$ 1829, 1845. 5 Am. Jur. 2d 142-144, Appeal and Error, §§ 698, 699.

DECISIONS UNDER FORMER LAW

Necessity for Argument

Word "argument" in former statute providing that judgment might be affirmed, but not reversed, without argument meant argument, whether written or oral, and where a case had been submitted on briefs, the court was required to decide the cause upon its merits and reverse or affirm the judgment, just as it would have done if there had been a full oral argument, since the statute simply meant that if the appellant failed to disclose by appropriate argument wherein the lower court had committed prejudicial error, the judgment might be affirmed but not reversed. State v. Guerin, 51 M 250, 256, 152 P 747. Where appellant in a criminal cause

fails to file his brief and on the day set for argument no appearance in behalf of either side is made, the judgment appealed from will be affirmed. State v. Cassill, 72 M 381, 382, 233 P 908.

95-2422. Entry and notice of orders and judgments. The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

History: En. 95-2422 by Sec. 1, Ch. 196, L. 1967.

Source: Montana Rules of Appellate Civil Procedure, Rule 30.

95-2423. Petitions for rehearing. A petition for rehearing may be filed within ten (10) days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have seven (7) days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit and in no event in excess of ten (10) days. A petition for rehearing may be presented upon the following grounds and none others: That some facts, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. Six (6) copies of the petition, produced in accordance with section 95-2420 (a), shall be filed with the clerk.

History: En. 95-2423 by Sec. 1, Ch. 196, Source: Montana Rules of Appellate L. 1967.

- 95-2424. Calendar—withdrawal of records. (a) Placing Causes upon Calendar. Thirty (30) days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.
- (b) Setting Causes for Argument. Causes against defendants held in custody will be set for argument by the court in advance of causes against defendants on bail unless for good cause the court shall otherwise order.
- (c) Permission to Take Record from Clerk's Office. The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

History: En. 95-2424 by Sec. 1, Ch. 196, L. 1967.

Source: Montana Rules of Appellate Civil Procedure, Rule 39.

Appeal, When Tried

Where appellant filed his transcript, and subsequently received seven separate or-

ders for extensions of time to file his brief, court would refuse appellant's application to vacate the hearing of the appeal. State v. Cockrell, 130 M 552, 305 P 2d 337, 338.

Collateral References Criminal Law 1132. 24A C.J.S. Criminal Law § 1829.

95-2425. Substantial and insubstantial errors on appeal. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the trial court.

History: En. 95-2425 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

If error exists which affects the substantial rights of the accused, then the decision should be reversed even though the error was not brought to the attention of the trial court.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 121-9.

Technical Errors

A judgment of conviction will not be reversed for error in the trial proceedings that did not prejudice, or tend to prejudice, defendant in respect to a substantial right. State v. Rhys, 40 M 131, 134, 105 P 494.

A judgment of conviction will not be reversed unless the error prejudiced, or tended to the prejudice of, defendant. State

v. Vanella, 40 M 326, 345, 106 P 364. In criminal cases no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant and where the record is sufficient to establish the guilt of the defendant, a new trial will not be granted, even though there was error, unless it clearly appears that the error complained of actually prejudiced the defendant in his right to a fair trial. State v. Dixson, 80 M 181, 213, 260 P 138; State v. Ray, 88 M 436, 446, 294 P 368.

Technical Errors-Absence of Juror

Failure of a properly notified juror to be present when the jury was impaneled did not invalidate the trial as the defendant had the right only to reject jurors and not to select any particular juror. State v. Moran, 142 M 423, 384 P 2d 777.

Technical Errors—Admission of Evidence

An erroneous ruling of the court in admitting evidence which could not affect the substantial rights of the parties must be disregarded. Church v. Zywert, 58 M 102, 107, 190 P 291.

Technical Errors—Apex Juris

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. State v. Connors, 27 M 227, 229, 70 P 715.

Technical Errors-Challenge to Juror

Held in a prosecution for receiving stolen property that where a juror on his voir dire in answer to questions propounded by the state admitted that he was a close friend of defendant but could try him as if he were a stranger, but that he would like to be excused, and then stated that he would not convict him even if he believed him guilty beyond a reasonable doubt, thereafter, however, on examination by defendant's counsel, again asserting that he would vote for conviction regardless of his friendship for defendant if proper under the law and the evidence, the court's ruling excusing the juror may not be held reversible error even though it be conceded that technical error was committed in sustaining the challenge on an improper ground. State v. Huffman, 89 M 194, 198, 296 P 789.

Technical Errors-Curing Prejudice

Withdrawal of evidence in criminal case, of similar offenses, on motion or by instruction is ineffective to cure prejudice unless supreme court on inspection of record can say that the effect of the evidence was clearly removed; and where a general objection was interposed, failure to move to strike or withdraw it from jury's consideration is immaterial. State v. Simanton, 100 M 292, 309, 49 P 2d 981, overruled on related issue in State v. Knox, 119 M 449, 453, 175 P 2d 774.

Technical Errors—Defective Information

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. State v. Phillips, 36 M 112, 118, 92 P 299.

Technical Errors—Degrees of Offense

Where under the evidence submitted at a trial for assault in the second degree,

the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. State v. Tracey, 35 M 552, 555, 90 P 791.

Technical Errors—Endorsing Name of Witness

Where a county attorney violated express statutory injunction by endorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. State v. McDonald, 51 M 1, 7, 149 P 279.

Technical Errors—Erroneous Instruction

Erroneous instructions are not cause for reversal in the absence of any prejudice. State v. Hay, 120 M 573, 194 P 2d 232, 236.

Technical Errors-Evidentiary Exhibits

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without objection by defendant, were taken to the jury room, at the close of the trial, apparently without the affirmative consent of defendant and without an order of court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of the defendant. State v. Cates, 97 M 173, 198, 205, 33 P 2d 578.

Technical Errors—Impeachment of Accused

The right of one on trial for crime forbidding his impeachment in any other manner than that prescribed by section 93-1901-11 is a substantial one. State v. Shannon, 95 M 280, 292, 26 P 2d 360.

Technical Errors—Improper Evidence and Cross-examination

Errors in the admission of improper evidence or in the permission of improper cross-examination have been held in and of themselves sufficiently prejudicial to justify the reversal of a judgment. State v. Patton, 102 M 51, 63, 55 P 2d 1290.

Technical Errors—Instructions to Jury Under this case, held, on appeal from a judgment of conviction for forgery, that,

while it was error to advise the jury in an instruction as to the purpose for which testimony of other like acts had been admitted, that testimony had been admitted relating to certain "forgeries," since whether or not a forgery had been committed was the fact to be determined by the jury, in view of other portions of the charge carefully safeguarding the rights of defendant, the inadvertent use of the term "forgeries" could not have worked to his prejudice. State v. Daems, 97 M 486, 500, 37 P 2d 322.

Technical Errors-Judge's Remarks

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer," while improper, held technical error and nonprejudicial when considered in connection with the particular circumstances. State v. Cassill, 71 M 274, 283, 229 P 716; State v. Sedlacek, 74 M 201, 216, 239 P 1002.

Technical Errors—Larceny

In a prosecution for the larceny of two calves, refusal of the court to strike the testimony of a cattleman that two cows, the condition of the bags of which indicated that they had lost their calves but a short time theretofore, were acting as though they were looking for them, held not reversible error under the circumstances, among them that defendant killed the calves after being charged with their theft and thus blocked the test proposed by the stock inspector by getting the cows and seeing whether they would claim the calves. State v. Grimsley, 96 M 327, 335, 30 P 2d 85.

Technical Errors—Leading Questions

Under the rule that the supreme court will not reverse a judgment of conviction for mere technical irregularities not affecting injuriously the substantial rights of appellant, for alleged error in overruling objections to several questions claimed to have been leading but which were of no special importance but merely explanatory in character, a new trial will not be ordered. State v. Wong Fong, 75 M 81, 88, 241 P 1072.

Technical Errors—Necessity of Transcript of Evidence

In order to give effect to predecessor section to determine whether the erroneous instructions were merely technical errors, or affected the substantial rights of the accused, it was necessary that the supreme court have before it a transcript of the evidence. State v. Hay, 120 M 573, 194 P 2d 232, 237.

Technical Errors—Presence of Accused at Trial

The presence of defendant at his trial was a matter which affected the substantial rights of both parties and therefore the provision requiring the supreme court to give judgment on appeal without regard to technical errors or defects not affecting the substantial rights of the parties, had no application. State v. Reed, 65 M 51, 61, 210 P 756.

Technical Errors—Presence of Jurors

Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error which prejudiced defendant in his substantial rights. State v. De Lea, 36 M 531, 536, 93 P 814.

Technical Errors—Presumption of Prejudice

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895, was abrogated by statutes declaring that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. State v. Gordon, 35 M 458, 466, 90 P 173; see State v. Byrd, 41 M 585, 592, 111 P 407.

It ought no longer to be the rule in criminal cases in this state that, error being shown, prejudice will be presumed, as was held prior to 1895, when the codes were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. State v. Byrd, 41 M 585, 592, 111 P 407.

Prejudice to appellant in a criminal cause cannot be presumed, but must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice. State v. Hall, 55 M 182, 188, 175 P 267.

Prejudice in a criminal case will not be presumed, but rather must appear from the denial or invasion of a substantial right from which the law imputes prejudice. State v. Straight, 136 M 255, 347 P 2d 482, 488; State v. Bubnash, 142 M 377, 382 P 2d 830.

Technical Errors-Prior Conviction

A technical error in pleading a prior conviction will not work a reversal, if the punishment imposed does not exceed the limit which could properly be imposed. State v. Paisley, 36 M 237, 248, 92 P 566.

Technical Errors—Questions

In a prosecution for first degree assault, question posed by the prosecution relating to potential criminal bribery, if error, was technical error which did not provide a basis for a reversal, in view of fact that questions posed were not evidence, that they were answered in the negative and that the court had instructed the jury not to consider the remarks of counsel. State v. Gallagher, 151 M 501, 445 P 2d 45.

Technical Errors-Rape

In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error, where there was no evidence that the articles were muddy, torn and blood-stained, as claimed, and thus likely to inflame the minds of the jurors, and where the original exhibits were not certified to the supreme court for inspection; prejudice cannot be presumed, but must be made to appear affirmatively. State v. Prouty, 60 M 310, 313, 199 P 281; Lindeberg v. Howe, 67 M 195, 199, 215 P 230.

Technical Errors—Supreme Court To Determine

It is for the supreme court to determine whether an error affects the substantial rights of the defendant. If the point can be decided from an inspection of the record, the court may act accordingly; if the defendant claims prejudice, it is his duty to demonstrate that fact from the record. State v. Byrd. 41 M 585, 592, 111, P 407.

State v. Byrd, 41 M 585, 592, 111 P 407. To warrant the supreme court in interfering with the judgment in a criminal case, it must appear that the substantial rights of the defendant have been injuriously affected. State v. Crean, 43 M 47, 60, 114 P 603.

Supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information, where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect. State v. Wehr, 57 M 469, 188 P 930.

Supreme court on appeal in a criminal cause must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the defendant. State v. McConville, 64 M 302, 309, 209 P 987.

If person has gone to trial under indictment on which witnesses' names were designated as Richard Roe and John Doe and convicted, the supreme court would be required to sustain the conviction if possible and burden would be on defendant to show prejudice. State ex rel. Porter v District Court, 124 M 249, 220 P 2d 1035, 1043.

It is up to the supreme court to decide whether an error affects the substantial rights of the defendant, and the defendant must demonstrate prejudice from the record. State v. Straight, 136 M 255, 347 P 2d 482, 488; State v. Bubnash, 142 M 377, 382 P 2d 830.

Technical Errors—Unresponsive Answer

Though refusal to strike out an unresponsive answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal is harmless error where the objectionable statement was volunteered on cross-examination after having been twice before made on his direct examination. State v. Jones, 48 M 505, 515, 139 P 441.

Waiver of Error

References by county attorney as to the nature of the trial, an appeal from justice court, claimed as prejudicial error in the district court, was waived by counsel for defendant when he approved instructions to be given by the court which included reference to justice court proceedings and thereafter obtained deletion from the instructions of the phrase which read "and was found guilty following a jury trial." State v. Gilbert, 139 M 204, 362 P 2d 221, 224.

Collateral References

Criminal Law \$ 1131 (4), 1186 (4). 24A C.J.S. Criminal Law § 825 (5); 24B C.J.S. Criminal Law § 1948. 5 Am. Jur. 2d 345 et seq., Appeal and

Error, § 914 et seq.

95-2426. Determination of appeal. On appeal the reviewing court may:

- (1) Reverse, affirm or modify the judgment or order from which the appeal is taken;
- (2) Set aside, affirm or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;

- (3) Reduce the degree of the offense of which the appellant was convicted;
 - (4) Reduce the punishment imposed by the trial court; or
 - (5) Order a new trial if justice so requires.

History: En. 95-2426 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 121-9.

Degree Presumed Correct

In the absence of testimony, it will be presumed on appeal that the trial court, in a burglary case, had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the nighttime, which constitutes the first degree of the offense, and that the punishment inflicted was proper. State v. Mish, 36 M 168, 175, 92 P 459.

Where the judgment was silent as to the degree of burglary of which defendant was convicted and the sentence imposed was such as might be imposed for first degree burglary only, supreme court would presume, where no appeal was taken, that the court ascertained that defendant was guilty of burglary in the first degree. State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220, 222.

Fair Trial Criterion

Where on appeal in a homicide case three of the justices of the supreme court, a majority, are of the opinion that the trial court committed error resulting in denial of a fair trial to defendant, but are unable to agree as to any one of the grounds urged by him in his assignment of errors being sufficient to warrant a reversal of the judgment, a retrial will be ordered; under such circumstances it is immaterial that the majority do not agree as to any particular error set forth in his assignment of errors—a mere procedural requirement — the real question being whether or not defendant had a fair trial. State v. Le Duc, 89 M 545, 580, 300 P 919.

Mandate, on Remand, Binding

Where supreme court reversed conviction of defendant and remanded cause to district court with directions that if defendant have a new trial the district court should first make inquiry into the defendant's insanity but if the prosecution is dismissed that the district court deliver the defendant to the court of another county which has continuing jurisdiction over the defendant so that the latter court may inquire into his mental condition and make such disposition of the defendant as is required by law; and thereafter the

prosecution was dismissed, the trial court then was compelled to deliver the defendant to the other district court and county attorney could not file a new information. The trial court was bound to follow the mandate of the supreme court as found in the remittitur and mandamus will lie to require that the district court follow such mandate. State ex rel. Kitchens v. District Court, 130 M 57, 294 P 2d 907. (Dissenting opinion, 130 M 57, 294 P 2d 907, 911.)

Modification of Judgment

A judgment of conviction for crime, which erroneously included payment by defendant of the costs of prosecution, is not on that account void as a whole; but the same may be modified by striking therefrom the provision as to costs, and, as so modified, be allowed to stand. State v. Stone, 40 M 88, 93, 105 P 89.

Reduction of Degree of Offense

Supreme court has the power to reduce a verdict of murder in the first degree to make it fit the crime established by the evidence, to wit, murder in the second degree. State v. Gunn, 89 M 453, 464, 300 P 212.

Reduction of Sentence

The sentence of a defendant, who pleaded guilty to grand larceny, to four years in the state prison, pursuant to section 94-2706, was reduced to one year by the supreme court where trial court passed sentence upon receipt of private reports without allowing defendant or his counsel to learn of the representations in the reports and a hearing to present evidence to refute such representations. Kuhl v. District Court, 139 M 536, 366 P 2d 347, 365.

Remand for New Trial

When a judgment of acquittal is reversed on appeal it is proper for the supreme court to remand the case to the district court for a new trial, where the defendant may then, if he desires, plead former acquittal in bar of such new trial. State v. Herron, 12 M 300, 30 P 140.

Collateral References

Criminal Law ← 1181-1193. 24B C.J.S. Criminal Law § 1943. 5 Am. Jur. 2d 335 et seq., Appeal and Error, § 897 et seq. 95-2427. Issuance of mandate, return of record and termination of jurisdiction. Upon termination of the appeal the supreme court shall remand the cause with proper instruction, together with the opinion of the court; and the clerk shall return all original documents to the trial court.

After the cause has been remanded to the trial court, the appellate court has no further jurisdiction of the appeal or the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the cause is remanded.

History: En. 95-2427 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, sections 121-10, and 121-14; Revised Codes of Montana 1947, sections 94-8210, 94-8214 and 94-8215.

Supreme Court's Loss of Jurisdiction

Where supreme court reversed conviction and the remittitur went down in due course and was filed with the lower court, the supreme court at that time lost jurisdiction in the case. Specifically it lost any jurisdiction it may have had theretofore to alter in any particular either the opinion or the mandate which followed upon

that opinion, certainly unless the remittitur were first recalled. State ex rel. Kitchens v. District Court, 130 M 57, 294 P 2d 907, 908.

Collateral References

Criminal Law 1192, 1193. 24B C.J.S. Criminal Law §§ 1950, 1952, 1953.

5 Am. Jur. 2d 389 et seq., Appeal and Error, § 962 et seq.

Grant of new trial by appellate court because of inability to perfect record for appeal. 13 ALR 107; 16 ALR 1158 and 107 ALR 603.

- 95-2428. Indigent appeals. (a) Upon imposition of any sentence in a criminal case a defendant may file in the trial court a petition requesting that he be furnished with a transcript of the proceeding at his trial. The petition shall be verified by the petitioner and shall state facts showing that he is at the time of filing the petition without financial means to pay for the transcript. If the trial judge who imposed sentence or in his absence any judge of the court finds that the defendant is without financial means with which to obtain the transcript of the proceedings at his trial he shall order the official court reporter to transcribe an original and copy of his notes of the proceedings at the trial. The original of the report of proceedings shall be filed with the clerk of the trial court and the copy shall be delivered to the defendant without charge.
- (b) Application to the Supreme Court. If the petition provided for in subsection (a) is denied by the trial court, a petition so to proceed may be filed in the supreme court within thirty (30) days after entry of the denial. The petition shall be accompanied by a copy of the verification filed in the trial court and of the statement of reasons for denial given by the trial court.

History: En. 95-2428 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 121-13.

95-2429. Appeal by one defendant. When several defendants are tried jointly, any one (1) or more of them may take an appeal; but those who do not join in the appeal shall not be affected thereby.

History: En. 95-2429 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8114.

Collateral References Criminal Law@=1027. 24 C.J.S. Criminal Law § 1658.

95-2430. Defendant discharged on reversal of judgment. If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.

History: En. 95-2430 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-8212.

Collateral References Criminal Law = 1186 (7). 24B C.J.S. Criminal Law § 1951. 5 Am. Jur. 2d 374 et seq., Appeal and Error, § 948 et seq.

CHAPTER 25

APPELLATE REVIEW OF LEGAL SENTENCES

Section 95-2501. Review division of the supreme court for review of certain sentences. 95-2502. Procedure for review. 95-2503. Review—decision.

95-2504. Scope of act.

95-2501. Review division of the supreme court for review of certain sentences. The chief justice of the supreme court of Montana shall appoint three (3) district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court. This review division shall meet at least four (4) times a year or more as its business requires as determined by the chairman. The decision of any two (2) of such judges shall be sufficient to determine any matter before the review division. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge. The review division shall hold its meetings at Deer Lodge, and may adopt any rules and regulations which will expedite their review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation.

History: En. 95-2501 by Sec. 1, Ch. 196, Source: General Statutes of Connecti-L. 1967. cut, section 51-194.

95-2502. Procedure for review. Any person sentenced to a term of one (1) year or more in the state prison by any court of competent jurisdiction may, within sixty (60) days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered, an application for review of the sentence by the review division. Upon imposition of the sentence the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law. The clerk shall transmit such application to the review division and

shall notify the judge who imposed the sentence, and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence, and shall transmit such a statement within seven (7) days, if requested to do so by the review division. The review division may for cause shown consider any late request for review of sentence and may grant such request. The filing of an application for review shall not stay the execution of the sentence.

History: En. 95-2502 by Sec. 1, Ch. 196, L. 1967.

Source: General Statutes of Connecticut, section 51-195; Annotated Laws of Massachusetts, Chapter 278, section 28B.

95-2503. Review—decision. The review division shall, in each case in which an application for review is filed in accordance with 95-2502, review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time, and may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review, or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports and any other records, documents or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted. The decision of the review division in each case shall be final and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, the principal officer of the institution in which he is confined and the decision shall be reported in the Montana Reports.

History: En. 95-2503 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section gives the review division the authority to substitute any sentence the trial judge could have imposed, including an increased term. The statute should be construed to prevent the consideration of evidence which was not before the trial judge, such as post-sentence rehabilitation and co-operation.

Source: General Statutes of Connecticut, section 51-196.

95-2504. Scope of act. A person who on the effective date of this act is imprisoned under a sentence to the state prison and who is not eligible for parole may, notwithstanding the partial execution of such sentence, file for a review of such sentence and of any other sentence imposed at that time; provided, that at the time of such request for review such person shall execute a written consent to such sentence as may be imposed by the review division on such review, including an increased term. No such application shall be considered if taken later than two (2) years after the effective date of this act nor in any case in which a different sentence could not have been imposed.

History: En. 95-2504 by Sec. 1, Ch. 196, L. 1967.

Compiler's Note

The effective date of this act was January 1, 1968. Section 3 of Ch. 196, Laws

1967 read "The Montana Code of Criminal Procedure is effective January 1, 1968, and its provisions apply to all proceedings in prosecutions for crimes alleged to have been committed on or after that date."

CHAPTER 26

POST-CONVICTION HEARING

Section 95-2601. Petition in the trial court.

95-2602. Proceedings commenced by petition.

95-2603. Contents of the petition. 95-2604. When motion may be made. 95-2605. Proceedings on the petition.

95-2606. Record must be kept.

95-2607. Successive petitions not allowed.

95-2608. Review.

95-2601. Petition in the trial court. Any person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, upon any ground of alleged error available under writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy may move the court which imposed the sentence or the supreme court or any justice of the supreme court to vacate, set aside, or correct the sentence.

History: En. 95-2601 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This section brings together and consolidates into one statute all the remedies, beyond those that are incident to the usual procedures of trial and review, which are available for challenging the

validity of a sentence of imprisonment. This remedy does not restrict a prisoner's rights of collateral attack. Any person adjudged guilty of an offense in a court of record, even though not incarcerated, may attack the validity of his conviction, using this procedure.

Source: Uniform Post-Conviction Procedure Act, section 1.

95-2602. Proceedings commenced by petition. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place or the clerk of the supreme court a verified petition. The clerk shall docket the petition upon its receipt and bring the same promptly to the attention of the court.

History: En. 95-2602 by Sec. 1, Ch. 196, L. 1967.

Source: Illinois Code of Criminal Procedure, Chapter 38, section 122-1.

95-2603. Contents of the petition. The petition shall identify the proceeding in which the petitioner was convicted, give date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. They shall identify any previous proceedings

that the petitioner may have taken to secure relief from his conviction. Arguments and citations and discussion of authorities shall be omitted from this petition.

History: En. 95-2603 by Sec. 1, Ch. 196, Source: Illinois Code of Criminal Procedure, Chapter 38, section 122-2.

95-2604. When motion may be made. A motion for such relief may be made at any time after conviction.

History: En. 95-2604 by Sec. 1, Ch. 196, L. 1967.

95-2605. Proceedings on the petition. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney in the county in which the conviction took place, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions with respect thereto.

The court may receive proof by affidavits, depositions, oral testimony or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, retrial, custody, bail or discharge as may be necessary and proper. If the court finds for the state the petitioner shall be returned to the custody of the person to whom the writ was directed.

History: En. 95-2605 by Sec. 1, Ch. 196, Source: Uniform Post-Conviction Procedure Act, section 7.

95-2606. Record must be kept. A court which entertains a motion pursuant to this chapter must keep a record of the proceedings and enter its findings and conclusions.

History: En. 95-2606 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

Without adequate recordation of a state court proceeding the federal courts will assume that the applicant did not receive a fair and adequate proceeding, or that its findings were not reliable and the federal court will accept the claim for relief and make an independent determination. As a result, it is suggested that a court reporter be present, so that if a full record is needed it will be available.

95-2607. Successive petitions not allowed. All grounds for relief claimed by a petitioner under this act must be raised in his original or amended petition, and any grounds, other than constitutional grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

History: En. 95-2607 by Sec. 1, Ch. 196, Source: Uniform Post-Conviction Procedure Act, section 8.

95-2608. Review. Either the petitioner or the state may appeal to the supreme court of Montana from an order entered on the motion. The appeal shall be taken within six (6) months from the entry of the order.

History: En. 95-2608 by Sec. 1, Ch. 196, L. 1967.

CHAPTER 27

HABEAS CORPUS

| Section | 95-2702. 95-2703. 95-2704. 95-2705. 95-2706. 95-2707. 95-2708. 95-2709. 95-2710. | Who may prosecute writ. Writ for purpose of bail. Application for, how made. By whom issued and before whom returnable. Writ granted without delay. Refusal to obey writ. Content of writ. Service of the writ. Return, what to contain. Production of person—exception for infirmity or illness. Hearing on return. Production of evidence—depositions. Disposition of petitioner. Appeal on order of judgment on habeas corpus. |
|---------|--|---|
| | | Writ and process may issue at any time. No release for technical defects. |

95-2701. Who may prosecute writ. Every person imprisoned or otherwise restrained of his liberty, within this state, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

History: En. 95-2701 by Sec. 1, Ch. 196, L. 1967.

Revised Commission Comment

This chapter has been narrowed to limit the scope of habeas corpus to its historical position in Montana. It is intended that most post-conviction remedies will be provided by the post-conviction hearing section.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, see Table A, M. R. Civ. P.

Child Custody

While the welfare of a child in the matter of its custody is of paramount interest in habeas corpus proceeding involving custody, neither such interest nor the child's wish will justify a court in denying its custody to the surviving parent, in the absence of a showing of unfitness or inability to support the child, and turning it over to a stranger. August v. Burns, 79 M 198, 213, 255 P 737.

Curable Defects in Process

Where committing order stated that defendant was convicted for the crime of burglary, together with a prior conviction of a felony, but defendant was properly convicted and sentenced for robbery, and had a prior conviction of felony, erroneous use of the word burglary, which had been the prior felony for which defendant had been convicted, did not constitute such defect as to allow for writ of

habeas corpus. Petition of Erickson, 146 M 456, 409 P 2d 447.

Defective Indictment Not Ground for Relief

On application for habeas corpus the court will not determine whether the indictment upon which complainant was convicted was defective, since the writ cannot be used as a substitute for a demurrer or a motion to quash, its inquiry being confined to a determination of the validity of the process on its face and whether the court had jurisdiction of the offense charged. State ex rel. Boone v. Tullock, 72 M 482, 493, 234 P 277.

Denial of Federal Constitutional Rights

A writ of habeas corpus is not available in the state courts of Montana to correct denials of federal constitutional rights. Brown v. State, 202 F Supp 29, 30.

Denial of Writ

The writ of habeas corpus is directed at unlawful imprisonment or restraint of liberty, and where, even if the writ had been issued, it would not have resulted in the release of petitioner from confinement since he was confined under a five-year sentence imposed concurrently with his original ten-year sentence, habeas corpus was denied. In re Wagner's Petition, 145 M 101, 399 P 2d 761.

Effect as Res Judicata

While a proceeding in habeas corpus involving the custody of a child is civil in its nature and the decision of the court

awarding its custody is final, except for abuse of discretion, its decision is res judicata only as to those matters properly determined by it on the merits. August v. Burns, 79 M 198, 213, 255 P 737.

Insufficient Commitment to Jail

Where a justice of the peace upon adjudging one guilty of contempt for dis-obeying a subpoena imposed a fine of \$100 and upon refusal of payment committed him to jail until payment be made, but thereafter accepted a cash bond in lieu of fine and imprisonment pending final disposition of a certiorari proceeding and appeal to supreme court, the objection that the commitment was insufficient under statute requiring imprisonment until payment of fine would not lie since if the sheriff should presume to hold contemnor thereunder the proper remedy would be habeas corpus. State ex rel. Mercer v. Woods, 116 M 533, 542, 155 P 2d 197.

Legality of Custody

Where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge. In re Dye, 32 M 132, 136, 79 P 689.

Motives of Prosecution

On a hearing of a habeas corpus sued out for the liberation of one who is sought to be extradited for the violation in another state it is not admissible to hear evidence upon, or to inquire into, the motives or purposes of the prosecution. State v. Booth, 134 M 235, 328 P 2d 1104, 1111.

Not of a Criminal Nature

Habeas corpus is not a special proceeding of a criminal nature. State ex rel. Brandegee v. Clements, 52 M 57, 59, 155 P 271; see also State ex rel. Newell v. Newell, 13 M 302, 305, 34 P 28; State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589, and State ex rel. Hepner v. District Court, 40 M 17, 104 P 872.

Petitioner, Not Defendant

The term "defendant" is not a proper designation for a petitioner in a habeas corpus proceeding. State ex rel. Jackson v. Kennie, 24 M 45, 50, 60 P 589.

Petit or Grand Larceny

Where a person, after a preliminary examination, is committed for grand larceny, and, upon his suing out a writ of habeas corpus, on the ground that he is guilty of petit larceny only, it appears from the evidence before the justice that he was guilty at least of petit larceny, and that there was a reasonable basis for the belief that he was guilty of grand larceny, it is the imperative duty of the court to remand him. In re Jones, 46 M 122, 125, 126 P 929.

Purpose

The purpose of a writ of habeas corpus is to determine the legality or illegality of the restraint alleged to be exercised; it is available only to persons unlawfully imprisoned or restrained of their liberty, and is independent of the legal proceeding under which the detention is sought to be justified. August v. Burns, 79 M 198, 213, 255 P 737.

Trial Court Jurisdiction

Where the court imposed a prison sentence for a misdemeanor, its judgment was void as being in excess of its jurisdiction, and the prisoner was entitled to habeas corpus. State v. District Court, 35 M 321, 326, 89 P 63.

On application for writ of habeas corpus, which presents the inquiry whether the trial court had jurisdiction of the subject matter of the prosecution and of the defendant and to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted by evidence dehors the record. In re Shaffer, 70 M 609, 613, 227 P 37.

Collateral References

Habeas Corpus € 1.

39 C.J.S. Habeas Corpus §§ 1, 4. 39 Am. Jur. 2d, Habeas Corpus, p. 183 et seq., § 8 et seq.; p. 198 et seq., § 28 et seq.

Right of one detained pursuant to quarantine to habeas corpus. 2 ALR 1542.

Perjury in verifying pleadings. 7 ALR

Habeas corpus to test constitutionality of ordinance under which petitioner is held. 32 ALR 1054.

Habeas corpus in case of sentence which is excessive because imposing both fine and imprisonment. 49 ALR 494.

Power to grant writ of habeas corpus pending appeal from conviction. 52 ALR 876.

Habeas corpus as remedy for exclusion of eligible class or classes of persons from jury list. 52 ALR 927.

Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged. 57 ALR 85.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1512.

Discharge on habeas corpus in federal court from custody under process of state court for acts done under federal authority. 65 ALR 733.

Statutory remedy as exclusive of remedy by habeas corpus otherwise available. 73 ALR 567.

Illegal or erroneous sentence as ground for habeas corpus. 76 ALR 468.

Habeas corpus as remedy in case of insanity of one convicted of crime. 121 ALR 270.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus. 124 ALR 1079.

Habeas corpus to secure release of one restrained of his liberty under provisions of selective military training and service act. 129 ALR 1186; 147 ALR 1313; 148 ALR 1388; 149 ALR 1457; 150 ALR 1420; 151 ALR 1456; 152 ALR 1452; 153 ALR 1422; 154 ALR 1448; 155 ALR 1452; 156 ALR 1450; 157 ALR 1450 and 158 ALR 1450.

Habeas corpus as adequate or inadequate for the purposes of an application for a writ of prohibition against contempt proceedings. 136 ALR 731. Change of judicial decision as ground

of habeas corpus for release of one held upon previous conviction. 136 ALR 1032.

Right of interned alien enemy or pris-per of war to habeas corpus. 137 ALR oner of war to habeas corpus. 137 ÅLR 1353; 147 ALR 1303; 149 ALR 1453 and 151 ALR 1453.

Discharge of minor from military service. 137 ALR 1483; 147 ALR 1311; 151 ALR 1455; 153 ALR 1420; 155 ALR 1451 and 157 ALR 1449.

Relief in habeas corpus for violation of accused's right to assistance of counsel.

146 ALR 369.

Habeas corpus as remedy where one is convicted upon plea of guilty or after trial, of offense other than one charged in indictment or information. 154 ALR 1135.

Habeas corpus on ground of unlawful treatment of prisoner lawfully in custody.

155 ALR 145.

Habeas corpus on ground of defective title to office of judge, prosecuting attorney, or other officer participating in petitioner's trial or confinement. 158 ALR

Former jeopardy as ground for habeas corpus. 8 ALR 2d 285.

Right of one at large on bail to writ of habeas corpus. 77 ALR 2d 1307.

Parolee's right to habeas corpus. 92

ALR 2d 682.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 ALR 3d 1360.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 ALR 3d 764.

Law Review

The Writ of Habeas Corpus, 26 Mont. L. Rev. 57 (1964).

95-2702. Writ for purpose of bail. When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.

History: En. 95-2702 by Sec. 1, Ch. 196,

Source: Revised Codes of Montana 1947, section 94-101-18.

When Bail Allowable

It is proper to allow bail, in a homicide case, in the absence of a showing, by the county attorney, that the proof of the defendant's guilt is evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 507, 90 P 513.

Collateral References

Habeas Corpus©33, 110. 39 C.J.S. Habeas Corpus §§ 34, 35, 39,

95, 102. 39 Am. Jur. 2d, Habeas Corpus, p. 209,

210, §§ 40-43; p. 278, § 145.

- 95-2703. Application for, how made. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:
- That the person in whose behalf the writ is applied for is unlawfully imprisoned or restrained of his liberty, why the imprisonment or restraint is unlawful, the officer or person by whom he is so confined or

restrained, and the place where, naming all the parties if they are known, or describing them if they are not known.

(b) The petition must be verified by the oath or affirmation of the party making the application.

History: En. 95-2703 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-2.

Denial of Speedy Trial

Petition for writ of habeas corpus by petitioner being held on detainer from another state, alleging that delay by other state in lodging a detainer deprived petitioner of right to a speedy trial, was denied on grounds that petitioner had de-

prived himself of a speedy trial by fleeing from the other state and his petition disclosed no factual basis as required by the statute on which to base the issuance of a writ. Petition of Ferguson, 150 M 178, 432 P 2d 773.

Collateral References

Habeas Corpus € 53, 54, 57. 39 C.J.S. Habeas Corpus § 75 et seq. 39 Am. Jur. 2d 265 et seq., Habeas Corpus, § 119 et seq.

95-2704. By whom issued and before whom returnable. The writ of habeas corpus may be granted:

- (a) By the supreme court, or any justice thereof, upon petition by or on behalf of any person restrained of his liberty in this state. When so issued it may be made returnable before the court, or any justice thereof, or before any district court or judge thereof.
- (b) By the district courts or a judge thereof, upon petition by or on behalf of any person restrained of his liberty in their respective counties or districts.

History: En. 95-2704 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-3.

Cross-References

District judge may issue and determine at chambers, secs. 93-802, 93-803.

Supreme court justices may issue, secs. 93-217, 93-801.

Writ of habeas corpus, Mont. Const. Art. VIII, §§ 3, 11, 21.

Collateral References

Habeas Corpus 44-46.

39 C.J.S. Habeas Corpus §§ 57, 58, 70, 78, 82, 84, 89.

39 Am. Jur. 2d 269 et seq., Habeas Corpus, § 129 et seq.

95-2705. Writ granted without delay. Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must if it appears that the writ ought to issue, grant the same without delay.

History: En. 95-2705 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-4.

Mandamus To Compel Action by District Court

A writ of mandate to compel district court to take action on a petition for a

writ of habeas corpus was denied by the supreme court where petitioner did not establish a clear legal right to have the writ of habeas corpus issued. Petition of John J. Tomich, 139 M 624, 365 P 2d 950.

Collateral References

Habeas Corpus \$62. 39 C.J.S. Habeas Corpus § 82.

95-2706. Refusal to obey writ. If the person commanded by the writ refuses to obey he shall be adjudged in contempt of court.

History: En. 95-2706 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Habeas Corpus \$≈81. 39 C.J.S. Habeas Corpus § 96. 39 Am. Jur. 2d 305, Habeas Corpus, §§ 176, 177.

Liability for statutory penalty of judge, court, administrative officer or other custodian of person, in connection with habeas corpus proceeding. 84 ALR 807.

- 95-2707. Content of writ. (a) The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court, or judge, before whom the writ is returnable, at a time and place therein specified.
- (b) The issue or issues to be determined upon return of the writ may be stated, either in the writ or in an order attached to the writ. If the issue or issues to be determined upon return of the writ are not stated therein, or in an order attached thereto then a copy of the petition must be attached to the writ.

History: En. 95-2707 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-5.

Collateral References

Habeas Corpus \$≈65. 39 C.J.S. Habeas Corpus \$84. 39 Am. Jur. 2d 271, Habeas Corpus, \$132.

- 95-2708. Service of the writ. (a) The writ must be served upon the person to whom it is directed. If the person to whom the writ is directed represents a state institution, a copy of the writ shall be served upon the attorney general. If such person represents a county institution, a copy of the writ shall be served upon the county attorney.
- (b) The writ shall be served by the clerk of court, the sheriff or any other officer directed to do so by the court.
- (c) The writ shall be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the court or judge.

History: En. 95-2708 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-6.

Collateral References

Habeas Corpus € 67. 39 C.J.S. Habeas Corpus § 85. 39 Am. Jur. 2d 271, Habeas Corpus, § 133.

- 95-2709. Return, what to contain. The person upon whom the writ is served must make a return and state in his return:
- (a) Whether he has the party in his custody or under his power or restraint.
- (b) If he has the party in his custody or under his power or restraint, he shall state the authority for and cause of such custody or restraint. If the detention is by legal process a copy thereof must be annexed to the response.
- (c) If he had the party in his custody or under his power or restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause and by what authority such transfer took place.
- (d) The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

History: En. 95-2709 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-8.

Collateral References

Habeas Corpus ₹ 75. 39 C.J.S. Habeas Corpus § 89. 39 Am. Jur. 2d 272, Habeas Corpus, § 135 et seq. 95-2710. Production of person—exception for infirmity or illness. The person commanded by the writ shall bring the detained person according to the command of the writ unless it is made to appear by affidavit that because of sickness or infirmity such person cannot be brought before the judge without danger to his health. If the judge is satisfied with the truth of the affidavit he may proceed and dispose of the case as if the party had been produced, or the hearing may be postponed until the party can be present.

History: En. 95-2710 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Habeas Corpus \$2. 39 C.J.S. Habeas Corpus §93. 39 Am. Jur. 2d 277, Habeas Corpus, §144.

- 95-2711. Hearing on return. (a) The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return.
 - (b) The hearing on the writ may be summary in nature.

History: En. 95-2711 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-11.

Collateral References Habeas Corpus \$\infty\$90.

39 C.J.S. Habeas Corpus §§ 100, 101, 107. 39 Am. Jur. 2d, Habeas Corpus, p. 275 et seq., § 142 et seq.; p. 285, § 153.

Determination of sufficiency of charge of crime, 81 ALR 552 and 40 ALR 2d 1151.

95-2712. Production of evidence—depositions. Evidence may be produced and compelled as in civil actions. Depositions taken in accordance with the Rules of Civil Procedure may be read as evidence at the hearing on the writ.

History: En. 95-2712 by Sec. 1, Ch. 196, L. 1967.

Cross-References

Depositions under Rules of Civil Procedure, see Chapter 93-2701, Rules 26 to 32.

Collateral References

Bar of limitations as proper subject of investigation in habeas corpus proceedings for release of one sought to be extradited. 77 ALR 902.

Motive or ulterior purpose of officials

demanding or granting extradition as proper subject of inquiry on habeas corpus. 94 ALR 1496.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings. 114 ALR 693.

Demanding papers in extradition proceedings as making out prima facie case in habeas corpus proceedings that accused was present in demanding state at time of commission of alleged crime or that he is a fugitive. 135 ALR 973.

95-2713. Disposition of petitioner. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding and such supplementary orders as to reassignment, retrial, custody, bail or discharge as may be necessary and proper. If the court finds for the state the petitioner shall be returned to the custody of the person to whom the writ was directed.

History: En. 95-2713 by Sec. 1, Ch. 196, L. 1967.

Collateral References

Habeas Corpus € 109, 111 (1). 39 C.J.S. Habeas Corpus § 102. 39 Am. Jur. 2d 288, Habeas Corpus, §§ 156, 157.

95-2714. Appeal on order of judgment on habeas corpus. An appeal may be taken to the supreme court by the state from an order of judgment discharging the petitioner. The court may admit the petitioner to bail pending appeal. The appeal shall be taken in the same manner as in civil actions.

History: En. 95-2714 by Sec. 1, Ch. 196, L. 1967.

95-2715. Writ and process may issue at any time. Any writ or process authorized by this chapter may be issued and served on any day or at any time.

History: En. 95-2715 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947, section 94-101-30.

Collateral References Habeas Corpus \$\infty\$67. 39 C.J.S. Habeas Corpus § 85.

95-2716. No release for technical defects. A person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting his substantial rights.

History: En. 95-2716 by Sec. 1, Ch. 196, L. 1967.

Source: Revised Codes of Montana 1947. section 94-101-16.

Legality of Custody

Where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge. In re Dye, 32 M 132, 136, 79 P 689.

Collateral References

Habeas Corpus 30 (3). 39 C.J.S. Habeas Corpus §§ 15, 16, 26,

39 Am. Jur. 2d 211, Habeas Corpus, § 46.

CHAPTER 28

ADOPTION OF RULES OF CRIMINAL PROCEDURE

Section 95-2801. Supreme court to promulgate rules of pleading, practice and procedure in criminal actions-effect on substantive rights.

95-2802

Appointment of advisory committee—members—duties. Suggestions on proposed rules before adoption—distribution to other 95-2803. groups-petitions-hearings.

Present laws and rules to remain in force until modified or superseded. 95-2804. 95-2805. Effective date of rules-expiration of supreme court's rule-making

95-2806. Legislature's right to adopt rules not abridged.

95-2801. Supreme court to promulgate rules of pleading, practice and procedure in criminal actions—effect on substantive rights. The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time, for the purpose of simplifying criminal proceedings in the courts of Montana and for promoting the speedy determination of such proceedings upon their merits. Such rules shall not abridge, enlarge, or modify the substantive rights of either the state or a defendant and shall not be inconsistent with the constitution of the state of Montana.

History: En. Sec. 1, Ch. 193, L. 1967.

95-2802. Appointment of advisory committee—members—duties. Before any rules are adopted the supreme court shall appoint an advisory committee consisting of six (6) members of the bar of the state, three (3) of whom shall be county attorneys and three (3) judges of the district courts to assist the court in considering and preparing such rules as it may adopt.

History: En. Sec. 2, Ch. 193, L. 1967.

95-2803. Suggestions on proposed rules before adoption—distribution to other groups—petitions—hearings. Before any rule is adopted, the supreme court shall distribute copies of the proposed rule to the bench and bar of the state for their consideration and suggestions and give due consideration to such suggestions as they may submit to the court. The Montana bar association or the association of Montana judges may file with the supreme court a petition specifying their suggestions concerning any existing or proposed rule and requesting a hearing thereon within six (6) months after the filing of the petition.

History: En. Sec. 3, Ch. 193, L. 1967.

95-2804. Present laws and rules to remain in force until modified or superseded. All present laws and rules relating to criminal pleading, practice and procedure, shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act such laws and rules, in so far as they are in conflict therewith, shall thereafter be of no further force and effect.

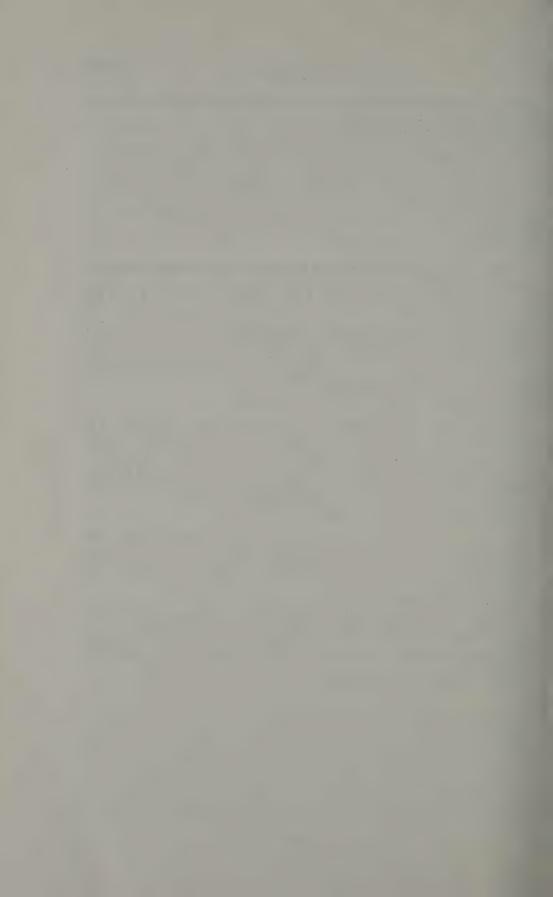
History: En. Sec. 4, Ch. 193, L. 1967.

95-2805. Effective date of rules—expiration of supreme court's rule-making power. All rules promulgated under this act shall be effective at a time fixed by the supreme court, but such rule-making power shall expire January 1, 1969.

History: En. Sec. 5, Ch. 193, L. 1967.

95-2806. Legislature's right to adopt rules not abridged. This act shall not abridge the right of the legislature to enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto.

History: En. Sec. 6, Ch. 193, L. 1967.















DOES NOT CIRCULATE



